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Supreme Court, U.S.
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No

In The
Supreme Court of the United States

DONALD D. CHISHOLM,

Pro Se Petitioner,

vs.

THE STATE OF MAINE,

Respondent.

**Petition For A Writ Of Certiorari
To The Supreme Judicial Court,
Sitting As The Law Court
Of The State of Maine**

PETITION FOR A WRIT OF CERTIORARI

Donald D. Chisholm
37 Knickerkane Rd.
Boothbay, Me. 04537
(207) 542-1952
Pro Se Petitioner

QUESTIONS PRESENTED

I. Whether a newly enacted Maine Criminal Statute applies to the prosecution of a case where the maximum sentence for the alleged current criminal behavior is raised for the fact of a prior conviction. The prior conviction occurred 12 years before the effective date of the new statute defining the crime and its inclusion as an element in the indictment increases considerably the maximum allowable sentence otherwise available by statute. Does the ex post facto clause of the United States Constitution prohibit the inclusion of the prior conviction as an element of the crime because it occurred before the effective date of the statute?

II. Was Chisholm afforded the due process of law as provided in the Fourteenth Amendment of the United States Constitution.

LIST OF THE PARTIES

petitioner

Donald D. Chisholm
37 Knickerkane Road
Boothbay, Me. 04537

for the State of Maine

Geoffrey Rushlau, D.A.
Lincoln County Courthouse
High Street
P.O. Box 249
Wiscasset, Me. 04578-0249

copy of petition to:
for the State of Maine

G. Steven Rowe
Attorney General
6 State House Station
Augusta, ME 04333-0006

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Title 29-A M.R.S.A. §2411

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Title 17-A § 32

Title 17-A § 33

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28 U.S.C. section1257(a)

Maine Rules of Court

Rule 11

UNITED STATES CONSTITUTION

article 1, section 9

The Fourteenth Amendment

OPINIONS BELOW

This petition for a writ of certiorari in the United States Supreme Court proceeds from the denial for relief in a post-conviction review action. Justice E. Allen Hunter filed the denial, "DECISION AND ORDER" (Case Number CR - 03-017), in Superior Court in the County of Lincoln, State of Maine, on January 23, 2006. A copy of that decision is attached in Appendix A. The post conviction review petition was filed by Chisholm on September 13, 2003.

After a brief stay of proceedings pending a motion for clarification, Chisholm applied to the Maine Supreme Judicial Court, Sitting as the Law Court, for a discretionary appeal of above decision on April 21, 2006. A copy is attached in Appendix B. On December 13, 2006 the application was denied in the form of a one page "ORDER DENYING CERTIFICATE OF PROBABLE CAUSE". The reviewing panel mentions one of the issues raised in the petitioner's application but offers no legal grounds for denial. The "ORDER..." is attached in Appendix C.

JURISDICTION

The Maine Supreme Court denied discretionary review on December 13, 2006. This Court has jurisdiction pursuant to 28 U.S.C. section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

The Constitution of the United States, article 1, section 9, prohibits the Legislature of the United States from passing any ex post facto law; and, in section 10, lays several restrictions on the authority of the Legislatures of the several states; and, among them, 'that no state shall pass any ex post facto law.'

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

B. State Statutory Provisions

The Maine Criminal Code provides as follows:

17-A M.R.S.A § 1 The Maine Criminal Code, Title 17-A, Part 1, Chapter 1, § 1 provides

relevant part:

"When it is alleged that an element occurred on or about any date prior to the effective date of the code, the prosecution shall be governed by the prior laws."

and (2) that

"For purposes of this section, a crime was committed subsequent to the effective date if all of the elements of the crime occurred on or after that date; a crime was not committed subsequent to the effective date if any element thereof occurred prior

to that date, or if the evidence may reasonably be interpreted to establish that any element may have occurred prior to that date. [1981, c. 324, 1 (amd).](emphasis added)."

and (6) that

"Application to crimes outside the code

1. The provisions of Parts 1 and 3 and chapter 7 are applicable to crimes defined outside this code, unless the context of the statute defining the crime clearly requires otherwise. [1989, c. 502, Pt. D, § 9 (amd).] "

Title 17-A Chapter 4, section 1
relevant part:
"Criminal statutes drafted in the future *must* conform as closely as possible to the general principles and guidelines set out in the code. "

Title 29-A M.R.S.A. § 2411 (6)[1]
Subsection (6) reads as follows:
"A6. Aggravated punishment category. An operator commits a Class C offense if the State pleads and proves that the operator, while operating a motor vehicle in violation of this section:
A. In fact caused serious bodily injury as defined in Title 17-A, section 2, subsection 23

[1] Title 29-A M.R.S.A. Sec. 2411 as of November 10, 2000 attached in full APPENDIX D.

to another person or in fact caused the death of another person; or [1999, c. 703, '1 (new).]

B. Has either a prior conviction for a Class C crime under this section or a prior criminal homicide conviction involving or resulting from the operation of a motor vehicle while under the influence of intoxicating liquor or drugs or with a blood-alcohol content of 0.08% or greater. [1999, c. 703, '1 (new).]

The sentence must include a period of incarceration of not less than 6 months, a fine of not less than $2,000 and a court-ordered suspension of a driver's license for a period of 6 years. These penalties may not be suspended. [1999, c. 703, '1 (rpr).]"

This Class C subsection, effective August 11, 2000."

M.R.S.A. Title 15, Chapter 305-A. 15 § 2124, section 3 (C). [2]

relevant part

"C. A pending trial or any of the restraints or impediments specified in subsection 1 following a criminal judgment in this State, another state or in a Federal Court for a crime for which proof of the criminal judgment of this State that is challenged constitutes an element of the subsequent crime."

M.R.S.A. 17-A § 32. Elements of crimes defined

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[2] M.R.S.A. Title 15, Chapter 305-A Post Conviction Review attached in full APPENDIX E.

relevant part
"No person may be convicted of a crime unless each element of the crime is proved beyond a reasonable doubt. 'Element of the crime' means the forbidden conduct; the attendant circumstances specified in the definition of the crime; the intention, knowledge, recklessness or negligence as may be required; and any required result. [1981, c. 324, § 14 (new).]Section History:1981, c. 324, § 14 (NEW). "

M.R.S.A. 17-A § 33.Result as an element; causation

"Unless otherwise provided, when causing a result is an element of a crime, causation may be found where the result would not have occurred but for the conduct of the defendant operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the defendant was clearly insufficient. [1981, c. 324, § 14 (new).]"

C. State Rules of Court

MAINE Rules: Rules of Criminal Procedure

"RULE 11. PLEAS; ACCEPTANCE OF A PLEA TO A CHARGE OF A CLASS C OR HIGHER CRIME

(a) Pleas.

(1) In General. A defendant may plead not guilty, not criminally responsible by reason of

insanity, guilty, or nolo contendere. A defendant may plead both not guilty and not criminally responsible by reason of insanity to the same charge. The court may refuse to accept a plea of guilty or nolo contendere.

If a defendant refuses to plead, or if the court refuses to accept a plea of guilty or nolo contendere, the court shall enter a plea of not guilty.

(2) Conditional Guilty Plea. With the approval of the court and the consent of the attorney for the state a defendant may enter a conditional guilty plea. A conditional guilty plea shall be in writing. It shall specifically state any pretrial motion and the ruling thereon to be preserved for appellate review. If the court approves and the attorney for the state consents to entry of the conditional guilty plea, they shall file a written certification that the record is adequate for appellate review and that the case is not appropriate for application of the harmless error doctrine. Appellate review of any specified ruling shall not be barred by the entry of the plea.

If the defendant prevails on appeal, the defendant shall be allowed to withdraw the plea.

(3) Fine on Acceptance of Guilty Plea in District Court. The District Court clerk may, at the signed request of the defendant, accept a guilty plea upon payment of a fine as set by the judge in the particular case or as set by the judge in accordance with a schedule of fines established

by the judge with the approval of the Chief Judge for various categories of such offenses.

(b) Prerequisites to Accepting a Plea of Guilty or Nolo Contendere to a Class C or Higher Crime. In all proceedings in which the offense charged is murder or a Class A, Class B, or Class C crime, before accepting a plea of guilty or nolo contendere, the court shall insure:

(1) That the plea is made with knowledge of the matters set forth in subdivision (c); and

(2) That the plea is voluntary within the meaning of subdivision (d); and

(3) That there is a factual basis for the charge, as provided in subdivision (e); and

(4) That an unrepresented defendant has waived the defendant's right to counsel.

(c) Insuring That the Plea Is Made Knowingly.Before accepting a plea of guilty or nolo contendere, the court shall address the defendant personally in open court and inform the defendant of, and determine that "the defendant understands, the following:

(1) The elements of the crime charged, the maximum (EMPHASIS ADDED)

possible sentence and any mandatory minimum sentence; and...."

History of the Case

In 1987, on October 3 at approximately 10:05 P.M. Robert Beale and Petitioner, Donald

D. Chisholm were operating motor vehicles on Commercial Street (Route 1A) in Portland, Maine. Robert Beale was northbound and Donald Chisholm was southbound. Those vehicles collided on a curve in the roadway. Robert Beale was killed instantly. Donald Chisholm survived with minor injuries. An investigation by the Portland Police Department resulted in vehicular manslaughter charges (Cum CR-87-1955) being brought against the survivor of the collision, Donald Chisholm. After a jury-waived trial, Justice Paul Fritzsche found Donald Chisholm guilty of operating under the influence and manslaughter and sentenced him to Department of Corrections for eight years, all but six suspended, four years probation, a driver's license suspension of six years and a fine of one thousand dollars. The conviction was appealed to the Maine Supreme Court and affirmed.

On November 10, 2000 in Edgecomb, Maine, the Petitioner, Donald Chisholm, the same person convicted in CR-87-1955 above, was arrested and charged with operating under the influence (WISSC –CR-2001-048). This indictment was brought in accordance with 29-A M.R.S.A. § 2411(6)(B) effective in July of the year 2000. After consultation with an Attorney of the Maine Bar Association and after completing a Rule 11[3] Hearing before Justice E. Allen Hunter,

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[3] Sentencing hearing for defendant pleading guilty in Maine. Rule 11 rules of procedure above.

Donald Chisholm, the current pro se petitioner, plead guilty to the November 10, 2000 OUI charge. This Rule 11 Hearing was conducted on January 16, 2002.

A few days prior to reporting to serve the sentence Chisholm wrote a letter to the sentencing Judge[4] venting frustration over what he saw as a less than acceptable Rule 11 Hearing on January 16th, 0f 2002.

On December 24, 2002 Chisholm filed a motion to reverse the sentence rendered at the Rule 11 Hearing of January 16, 2002. That motion was filed under M.R. Crim. P. 35[5]. On June 13, 2003 Judge E. Allen Hunter issued an **"ORDER"** denying the motion under rule 35. Justice Hunter stated in the order that "Chisholm does not raise any valid arguments concerning Rule 11" and that the other issues were not "valid grounds for a Rule 35 Motion".

The LAW COURT denied an application for a certificate of probable cause to appeal the "ORDER" on Rule 35 on September 15th, 2003. In so doing Supreme Judicial Court Judge Robert W.

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[4] Appendix F. This letter relevant to both the "element of the crime" vs. "sentence enhancement" issue per McMillan v. Pennsylvania , 477 U.S. 79 (1987) and Rule 11, Maine Rules of Court issue.

[5] See Appendix G . ISSUES listed in Motion 35 of December 24, 2002 , copy of issues page.

Clifford wrote "it is apparent that the appeal does not raise any issue worthy of being fully heard." [6]

While the Rule 35 Motion was pending in Lincoln County, Chisholm had taken further action in Cumberland County regarding the prior conviction element of Wisc 01-48, **Cr-87-1955**. A post conviction review action in accordance with M.R.S.A. 305-A 3, B(2) was filed on January 13, 2003.[7] Chisholm believed that a post-conviction action under this section should be filed in the Court and County of original jurisdiction. However, the clerk of Cumberland County returned the petition with instructions that it should be filed in Lincoln County Superior Court where the later operating under the influence charge had been prosecuted. The petition was promptly filed with Lincoln County as instructed. At the time the petition for discretionary review with the Maine Supreme Court on the denial of the Rule 35 motion was still pending, the petition for post- conviction review was stayed. Upon the denial for certiorari with the Maine Supreme Court on the Rule 35 Motion, a consolidated post conviction action was filed in Lincoln County Superior Court which included additional issues for review. Process of the post-conviction review petition began on September 13, 2003 upon the

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[6] See Appendix H for "ORDER. DENYING CERTIFICATE OF PROBABLE CAUSE."RULE 35

[7] See Appendix I. "PETITION FOR POST CONVICTION REVIEW" (with appendix "B" only)

denial from the LAW COURT of the certificate of appeal on the Rule 35 motion. After two oral hearings[8] and the passing of almost three years, finally, on January 12, 2006, Justice E. Allen Hunter issued the "**DECISION AND ORDER**" denying the relief requested[9]. Chisholm applied to the Maine Supreme Court for a certificate of probable cause for certiorari and was denied on December 13, 2006[10]. This current application for certiorari to the United States Supreme Court ensued.

STATEMENT OF PRESENT LEGAL CASE

Question Presented I.

This application for certiorari to the U.S. Supreme Court has as a foundation, almost entirely, the concurring opinion of Justice Clarence Thomas in which Justice Scalia joined in part in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

held:

" *other than fact of prior conviction*, any fact that increases penalty for crime beyond prescribed statutory maximum must be submitted to jury and

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[8] No evidentiary hearing on the post conviction review of the prior conviction element was ever heard, although transcripts and Court records of both Cr-87-1955 and CV-89-1271 were supplied to E. Allen Hunter by the Cumberland County Superior Court.

[9] See APPENDIX A.

[10] Attached as APPENDIX C.

proved beyond reasonable doubt." (Emphasis added)

This clear directive from the Court excludes the fact of a prior conviction from the constitutional requirement of proof beyond a reasonable doubt to a jury. Chisholm's question to the U.S. Supreme Court, based upon the analysis of Justice Thomas, is -what constitutional protections are afforded to a prior conviction when that fact raises the maximum sentence. Despite the prosecution not needing to prove the fact of the prior conviction beyond a reasonable doubt to a jury, is the prior conviction nonetheless "an element of the crime" if it raises the maximum available sentence for the current criminal behavior?

The concurring opinion in *Apprendi* further states:

" Thus, it is critical to know which facts are elements. This question became more complicated following the Court's decision in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), which spawned a special sort of fact known as a sentencing enhancement. See *ante,* at 2356, 2360, 2365. Such a fact increases a defendant's punishment but is not subject to the constitutional protections to which elements are subject."

Chisholm began asking the question of whether his prior conviction for vehicular manslaughter was an "element of the crime" or a "sentencing enhancement" prior to and on record

at the Rule 11 Hearing of January 16, 2002 before Judge E. Allen Hunter and to date has received no opinion from this Judge or from The Maine Supreme Judicial Court and none is pending. There are no additional procedures available in the Maine criminal process to elicit such an opinion. These rulings below indicate that the Maine Judicial System does not agree with Justice Thomas and *Apprendi* that "Thus, it is critical to know which facts are elements". The Maine Supreme Court issued only a denial of certiorari, not any legal analysis. Justice E. Allen Hunter who was assigned the post-conviction action by the chief Justice of the Superior Court stated in his ***DECISION AND ORDER*** at page 9 , "This court is not required to engage in the 'element' versus 'enhancement factor' analysis put forth by the Petitioner as Apprendi is not applicable to this case."[11] Whether Judge Hunter believed that *Apprendi* had any application to *Chisholm* or not, the Maine Rules of Criminal Procedure require that

> "the court shall address the defendant personally in open court and inform the defendant of, and determine that "the defendant understands, the following:
>
> (1) The elements of the crime charged..."

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[11] Judge Hunter presided over the Rule 11, Sentencing hearing, and apparently believes that a defendant deciding whether to plead guilty to a crime need not know whether an attached prior conviction is an element or an enhancement factor per *McMillan* through *Apprendi* line of cases.

Justice Thomas goes further in his concurring opinion in *Apprendi* in stating:

> "A long line of essentially uniform authority addressing accusations, and stretching from the earliest reported cases after the founding until well into the 20th century, establishes that the original understanding of which facts are elements was even broader than the rule that the Court adopts today.
>
> This authority establishes that a "crime" includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact--of whatever sort, including the fact of a prior conviction--the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.".

The most important and bottom line goal of this application for certiorari to the U.S. Supreme Court is to have the Court clearly establish or deny the following principle of constitutional law:

Prior convictions that raise the penalty for a crime beyond the prescribed statutory maximum are elements of the crime. As elements, prior convictions have the same constitutional protection as any crime consisting of one or more elements (except the fact of a prior conviction

need not be proven beyond a reasonable doubt to a jury). In order to include a prior conviction element in an indictment or information, and raise the maximum available sentence, the prior conviction must have occurred on or after the effective date of the statute defining the aggravated crime.

Discussion

Chisholm has studied the progression of cases that address the ex post facto clause of the United States Constitution including :

Calder v. Bull, 3 U.S. 386 (1798), *Kring v. State of Missouri*, 107 U.S. 221 (1883), *Thompson v. State of Missouri*, 171 U.S. 380 (1898), *Beazell v. State of Ohio*, 269 U.S. 167 (1925), *Lindsey v. State of Washington*, 301 U.S. 397 (1937), *Dobbert v. Florida*, 432 U.S. 282 (1977), *Weaver v. Graham*, 450 U.S. 24 (1981), *Miller v. Florida*, 482 U.S. 423 (1987), *Collins v. Youngblood*, 497 U.S. 37 (1990), *Landgraf v. USI Film Products*, ___ U.S. ___ (1994) *California Dept. Of Corrections v. Morales*, ___ U.S. ___ (1995) .

In the context of *Chisholm* we are addressing the application of a new statute (bill no. "LD2406" [12]) to a case where a prior conviction element occurred 12 years prior to the effective date of the statute defining the "**aggravated crime**" , *Apprendi, supra.* The "criminal homicide conviction involving or resulting from the operation of a motor vehicle

[12] Final draft of bill in legislature attached APPENDIX J.

while under the influence of intoxicating liquor " is an aggravating element that had not previously existed in Title 29-A M.R.S.A. SEC. 2411.[13] Prior to the effective date of this new statute, July of 2000, Chisholm would have been charged with a statutory first time offense operating under the influence as described by M.R.S.A. § 2411 (5) A and punished within that section's proscribed sentence. The upper end of the sentence would have been controlled by the next level minimum described in section B. Of § 2411. Chisholm was in fact initially charged with a Class D crime under § 2411 (5) A, only to be re-indicted several months later under the new Class C crime § 2411 (6). The statutory jail time under the Class D (5) would have been 48 hours. The statutory jail time under Class C crime § 2411 (6) was a minimum 6 months and a maximum 5 years. On the minimum end the new statute increased the jail time by a multiple of 90 and on the maximum end by 900. The penalty for license suspension under the same analysis goes from 90 days to 6 years, a multiple of 24. The fine penalty goes from $400 to $2000, a multiple of 5. In *McMillan v. Pennsylvania*,477 U.S. 79 (1986) the Court addresses the degree of variance of sentencing impacted by "sentencing enhancements" and "elements of the crime".

> "We have noted a number of differences between this case and *Winship*, *Mullaney*, and *Specht*, and we find these

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[13] APPENDIX D

> differences controlling here. Our inability to lay down any "bright line" test may leave the constitutionality of statutes more like those in Mullaney and Specht than is the Pennsylvania statute to depend on differences of degree, but the law is full of situations in which differences of degree produce different results."

The degree changes in *Chisholm* from the Class D charge to the new Class C amendment of July 2000 are considerable.

Until *McMillan* there has been no doubt that prior convictions that elevate sentences have no protection from the *ex post facto clause* or *double jeopardy*. The case law supports the long held opinion of the Court that sentences "attach" to the current criminal behavior and not to the aggravating prior conviction. However, since *McMillan,* the standard has been established that prior convictions that raise the statutory maximum sentence have a more critical relationship to the degree of punishment and therefore are *elements of the crime* and not simply aggravating sentencing factors. What Constitutional protections exists for these critical elements? The early ex post facto cases, *Calder v. Bull*, 3 U.S. 386 (1798), *Kring v. State of Missouri*, 107 U.S. 221 (1883), *Thompson v. State of Missouri*, 171 U.S. 380 (1898) outline the criteria for ex post facto violations in Federal and State lawmaking. Chisholm admits that in a strict interpretation of those cases Maine Law, § 2411 (6), does not make illegal behavior that was

previously legal and punish him for the fact he did it. However, the *element of the crime* vs. *enhancement factor cases* including; *McMillan v. Pennsylvania*,477 U.S. 79 (1986), *Nichols v. United States*, Certiorari to the United States Court of Appeals for the Sixth Circuit ,No 02-8556, (June 6, 1994), *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), *Jones v. United States*, 526 U.S. 227 (1999), *Apprendi v. New Jersey* No. 99-478 (2000) and Supreme Court of United States and *Cunningham v. California*, No. 05-6551 have set the standard for determining when aggravating sentencing factors are "elements" and when they are "sentencing factors". The question has become does the aggravating factor raise the maximum sentence allowed by statute for the current criminal behavior. The main issue in these cases was whether the aggravating factor could be found as a fact by a Judge in the sentencing process or was required to be proven beyond a reasonable doubt by a jury. The latest case, *Cunningham,* has once again supported the earlier rulings that aggravating factors that raise the maximum sentence must be found to be facts by a jury beyond a reasonable doubt (except prior convictions). Chisholm contends that the United States Supreme Court has not excepted prior convictions that raise the maximum sentence from being classified as "elements of the crime" but rather have excepted prior convictions from the requirement of proof beyond a reasonable doubt by a jury. It is logical that the Supreme Court

would not require the jury finding of fact again, as these prior convictions have theoretically already been admitted to or have already been proven beyond a reasonable doubt in previous proceedings. Chisholm does not view the Maine legislative bill Ld2406 [14] or the statute § 2411 (6)[15], in and of themselves, as violations of the ex post facto clause of the Constitution. Any citizen charged with "criminal homicide involving or resulting from the operation of a motor vehicle while under the influence of intoxicating liquor" after the effective date of M.R.S.A § 2411 (6) faces possible future consequences of the new statute in the event of an operating under the influence charge. That liability or consequence would have been in place after July of 2000 in Maine. That consequence and liability was not in place when Chisholm was convicted of criminal homicide involving or resulting from the operation of a motor vehicle while under the influence of intoxicating liquor in 1988. It is, therefore, Chisholm's contention that the consequences or punishment for his 1988 conviction became more onerous when Maine charged him under the July of 2000 statute M.R.S.A § 2411 (6) and that the statutory sentence relates much more closely to the prior conviction element than it does to the current criminal behavior element. Chisholm contends he is being punished for both elements of the crime and the consequences of his prior conviction have

[14]APPENDIX J

[15]APPENDIX D

been made more onerous by the application of the new statute M.R.S.A § 2411 (6) to his case. Once again referring to *McMillan* the question of the *degree* of the impact of the aggravating sentencing factor becomes "crucial" within the definition of the word in Justice Thomas's concurring opinion in *Apprendi v. New Jersey*, 530 U.S. 466, 490 . The degree or standard that has been set by the U.S. Supreme Court in the *element of the crime* cases is the fact of whether or not the aggravating sentencing factor has raised the maximum available sentence. In the process of *Chisholm* in the Maine Superior Courts (with Judge E. Allen Hunter presiding) the question of whether the aggravating prior conviction was an element of the crime or an enhancement factor has been afforded no relevance and the Judge has consistently refused to rule on the question[16]. This refusal, prior to sentencing and during the post conviction review process, has been supported by the Maine Supreme Court in their refusal to issue a certificate of probable cause.

Without any ruling in *Chisholm* there are nonetheless rulings in Maine common law. "When the State charges a crime enhanced by prior

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[16] Chisholm filed a pro se ..Motion for Dismissal.. on the grounds of the element of the crime definition as contained in Maine Statutes and Maine Case Law. Despite Chisholm's insistence prior to and during the Rule 11 hearing (guilty plea hearing in Maine) that Judge Hunter issue a ruling on the motion, the Judge outright refused to do so. Motion attached APPENDIX K.(WITHOUT APPENDIX)

convictions of specified crimes, as it did in this case by charging Corliss with Class C OUI in violation of 29-A M.R.S.A. § 2411, the prior convictions are an essential element of the crime charged." See *Landry v. State*, 575 A.2d 315, 316-17 (Me. 1990). "An indictment must allege every element of the offense charged."

State v. Corliss, 1998 ME 36, 706 A.2d 593. (2000) . These cases make no distinction between prior convictions that raise the maximum sentence (classification) and those that enhance a sentence within the same sentencing classification, nevertheless using the term *element* freely. The United States Supreme Court cases *McMillan* through *Cunningham* require that the aggravating factor raise the maximum sentence in order to meet the definition of "element" verses a "*sentencing factor.*" Maine common law does recognize the distinction citing *Apprendi* in *State v. Hodgkins*, No. Docket: Oxf-02-413 (Me. 04/24/2003) The Court stated that "facts that expose a defendant to a punishment greater than that otherwise legally prescribed [are] by definition 'elements' of a separate legal offense." *Hodkins* does not involve a prior conviction as an aggravating factor and Chisholm is not aware of any other case in Maine common law that addresses prior convictions as elements as defined by *McMillan* through *Cunningham* and specifically addressed by United States Supreme Court Justice Thomas in his concurring opinion in *Apprendi.*

Petitioner Chisholm prays that the United States Supreme Court will grant certiorari on this issue of prior convictions as elements of the crime and clarify what Constitutional Protections apply to the application of new Maine Statutes that attach past convictions as elements of new "separate legal offenses", *Apprendi.*

Question Presented II

The secondary issue listed in this application for certiorari involves due process and provides support for Chisholm's position that prior convictions that raise maximum sentences should be afforded ex post facto protection. Chisholm questions the dedication and/or ability of the State of Maine's Judicial Branch to follow the letter of the law in the post conviction review protections provided in the Maine Criminal Statutes. This case is somewhat of a study of the degree to which a prior conviction element of a crime will be afforded a review for accuracy and legitimacy. Chisholm believes that despite meeting the prerequisites for a post conviction review of the prior conviction, no credible effort was made by the Maine Judicial Branch to conduct such a review. Perhaps much of this proposed state of affairs involves the fiscal budget of the judiciary and not bad intent.

Discussion

In the overall discussion of the use of a prior conviction to increase the maximum

statutory sentence, Chisholm believes there is an issue that needs to be addressed. The accuracy of convictions. Maine Law provides a protection and a method of reviewing the accuracy of a prior conviction when it is to be used as an element of a "subsequent offense" in M.R.S.A. Title 15, Chapter 305-A. 15 § 2124, section 3 (C).

relevant part

> "C. A pending trial or any of the restraints or impediments specified in subsection 1 following a criminal judgment in this State, another state or in a Federal Court for a crime for which proof of the criminal judgment of this State that is challenged constitutes an element of the subsequent crime."

Chisholm's Post Conviction Review Petition CR- 03-017, the denial of which resulted in this petition for certiorari to the United States Supreme Court, sought a review of the prior conviction element based upon factual finding from a subsequent civil trial (CV-89-1271). This portion of the post conviction review petition is attached as APPENDIX I. Chisholm and the prosecutor for the State of Maine, District Attorney Geoffrey Rushlau, appeared for oral hearing on January 20, 2005 as stated by Judge E. Allen Hunter in his **ORDER AND DECISION** of

January 23, 2006.[17] At this hearing a clerk for the Superior Court of Penobscot County physically placed the records from CR-87-1955 (criminal homicide case) and CV-89-1271 (civil wrongful death suit case) on the Judge's bench. Judge Hunter referred to these omnibus stacks of paper as this happened and made a comment to the effect that there was a considerable amount of information to study in order to consider the review of the prior conviction aspect of the case. Judge Hunter further had requested an opinion and affidavit from Chisholm's Attorney in those cases [18] swearing to his knowledge of the grounds for post conviction review. That affidavit is part of the record. At the hearing of January 20, 2005 there was no argument or rebuttal on the prior conviction element of the current offense as to the legitimacy of the guilty verdict in the jury waived criminal trial of 1987, CR-87-1955. It was agreed that an evidentiary hearing concerning the conviction in CR-87-1955 and the contributory negligence finding[19] in CV-89-1271 would only be necessary if the other legal issues of the post conviction review did not prevail in Chisholm's favor. Judge E. Allen Hunter's **DECISION AND ORDER** provided for no further hearing on this aspect of the review proceeding. In Chisholm's **MEMORANDUM IN SUPPORT OF**

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[17] Transcripts of this hearing were made part of the record to the Maine Supreme Judicial Court as part of the application for certificate of probable cause to appeal in this case.

[18] This affidavit is attached as APPENDIX L.

[19] Jury finding, last page of APPENDIX I.

CERTIFICATE OF PROBABLE CAUSE TO APPEAL the request for further hearing on the legitimacy of the conviction, CR-87-1955 was ignored by way of the simple unexplained denial and the statement "Based on our review, we determine that no further hearing or other action is necessary to a fair disposition of the matter."

The current petitioner would like to believe that the Maine Supreme Court jurists reviewed the transcripts of both CR-87-1955 and CV-89-1271, and the verdicts in both as they apply to

> "M.R.S.A.17-A § 33. Result as an element; causation
>
> Unless otherwise provided, when causing a result is an element of a crime, causation may be found where the result would not have occurred but for the conduct of the defendant operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the defendant was clearly insufficient. [1981, c. 324, § 14 (new).]"

and concluded that Chisholm's conduct at the time of the collision on October 10, 1987 was clearly sufficient to have caused the result- the death of another human being. Chisholm sincerely believes that no such review ever happened. Even if it did Chisholm was never given the opportunity to call witnesses, including jurist in CV-89-1271, to

establish the fact that the then defendant's conduct was insufficient to have caused the death of the other driver, Robert Beale.

For these reasons Chisholm does not believe he was afforded due process from the Court below in the post conviction review action for CR-2001-048, CR-03-017. Chisholm would extend the claim to the Maine Supreme Court Ruling, **"ORDER DENYING CERTIFICATE OF PROBABLE CAUSE".**

REASONS FOR GRANTING THE PETITION

I believe the Fourteenth Amendment of the United States Constitution provides the most fundamental reason that the petition should be granted. When I was first charged under the new Maine Statute Title 29-A M.R.S.A. § 2411 (6) I was unaware that there was such a law. I had for years been pursuing appeals of the prior conviction element without success and had served a number of years in prison for the crime. In 1993 the Maine Supreme Judicial reversed a summary judgment in the associated wrongful death suit and a retrial of the identical factual base of the causation issue in CR-87-1955 was conducted. I felt that I received some vindication for the degree of culpability in the death of Robert Beale when the jury in the civil trial, CV-89-1271, found contributory negligence. The years of guilt, frustration and stigma associated with the degree of negligence of a manslaughter conviction had been burdensome. When I let my guard down in

the year 2000 and admittedly operated a motor vehicle while under the influence of alcohol, the failures and pain of the past came streaming back. It was devastating. It was devastating prior to the State of Maine raising the classification of the crime to a Class C offense per M.R.S.A. § 2411 (6) . Now I had to answer again for a conviction I have never come to accept as the truth. My heart and my soul know that the burden and punishment for the conviction in 1988 has been made greatly more onerous as a result of the application of M.R.S.A. § 2411 (6). Had the sentence for the current operating under the influence charge been at the top of the classification for that crime I would have no disagreement with suffering that sentence. I believe the ex post facto clause of the United States Constitution has the purpose of preventing citizens from being punished again for conduct, and even disastrous results of conduct, for which they have already been punished. Can it honestly be stated that the punishment prescribed in M.R.S.A. § 2411 (6) attaches only to the current illegal conduct and not the prior conviction?

I believe the standard for defining elements of a crime as found since *McMillan v. Pennsylvania* , 477 U.S. 79 (1987) and through *Cunningham v. California*, No. 05-6551 should and does apply to prior convictions. I believe if the United States Supreme Court interprets the Constitution in a way that excludes a prior conviction element of a crime from ex post facto protection- when that element occurred prior to the enactment of a State Statute

that defines the new aggravated crime - then it may want to use this case to establish that finding of law. I can not ascertain from the case law that it has been clearly ruled that prior convictions that raise the maximum sentence are excluded as elements of a crime and that they are therefore exempt from ex post facto protection. I can ascertain from the case law that prior convictions that do not raise the maximum sentence are in fact "sentence enhancements" and not protected by the ex post facto clause.

It is becoming prevalent across the United States that recidivist law is attaching greater punishment for repeat offenders. There is certainly justification from a deterrence perspective. However, I am a witness to the truth that not all trial processes are of the quality that result in a just verdict. Without de facto processes by which a defendant can challenge the accuracy of a prior conviction their attachment as an element of a new offense is dangerous to ordered liberty. It may be beyond the resources of the States of the United States to provide adequate review of these prior offenses. I believe that to be the case in *Chisholm*. There is undoubtedly a significant percentage of the current prison population that would qualify for release if the attachment of some prior conviction is ruled a violation of the ex post facto clause because the prior conviction preceded the statute that defined the aggravated crime. Some of those undoubtedly would deserve to be released.

I pray that the concurring opinion in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) will be

revisited by the jurists of the United States Supreme Court and that all elements of a crime charged, including prior convictions, will be granted ex post facto protection.

CONCLUSION

This Court should for the above reasons grant this Petition for a Writ of Certiorari.

DATED: March 6, 2007

Respectfully submitted

Donald D. Chisholm

Pro Se Petitioner

STATE OF MAINE
LINCOLN, ss.

SUPERIOR COURT
CRIMINAL ACTION
DOCKET NO. CR-03-017

DONALD CHISHOLM,
Petitioner

v.

STATE OF MAINE,
Respondent

DECISION AND ORDER

Pending before this court is the Petitioner's petition for post-conviction review and the States motion to dismiss. On January 20,2005, the court conducted a testimonial hearing in connection with this motion. The State was represented by District Attorney Geoffrey Rushlau. The Petitioner who had not requested court appointed counsel appeared pro se and represented himself.

BACKGROUND

Pursuant to 15 M.R.S.A. § 2121-2132 (Supp.2004), the Petitioner, Donald Chisholm, has filed a petition for post-conviction review seeking to have his convictions for Operating Under the Influence (Class C) (Count I) and Operating After Suspension (Class E) (Count 2) (Lincoln County Docket No. Cr-01-048) set aside. Pursuant to the provisions of 29-A M.R.S.A. § 2411(6), the State charged the Petitioner with the offense of operating under the Influence as a Class C felony.

This was predicated upon the Defendant's prior conviction for a criminal homicide arising out of the operation of a motor vehicle while under the influence of alcohol or intoxicants or with an excessive blood

alcohol level.[1] On July 27, 2001, the Petitioner filed a Motion to Suppress, which the court denied on November 6, 2001.[2] On January 16, 2002, the Petitioner pleaded guilty to both counts. On count 1, the court sentenced the Petitioner to the Department of Corrections for a term of three years with all but ten months suspended and placed him on probation for a period of one year and six months. The court also fined the Petitioner $2000 plus the applicable fees and surcharges. The court further sentenced the Petitioner to a concurrent six months term on Count 2.

On December 26, 2002, the Petitioner filed a Rule 35 Motion, which the court later denied.[3]

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[1] The Petitioner has a prior conviction for Manslaughter (17-A M.R.S.A. § 203(1) in Cumberland County CR-87-1955. Because of this prior conviction, pursuant to 29-A M.R.S.A § 2411(6), what would otherwise have been a Class D offense is enhanced to a Class C offense.

[2] The Petitioner also filed a motion for a Bill of Particulars and a motion to dismiss . the Petitioner's plea rendered these motions moot.

[3] After sentencing, the Petitioner filed two letters with the court. The court interpreted the letters to be a rule 35 Motion and on February 28,2002, the court denied the Petitioner's Rule 35 motions. The Petitioner then contacted the court and indicated that he did not intend his letters to constitute a Rule 35 motion, thus, on April 18,2002, the court rescinded the Order denying the Petitioner's motions.

APPENDIX A

The Petitioner filed this petition for post conviction review on January 16, 2003. After review of the pleadings and the record, the court determined there was no need for an evidentiary hearing on the petition as the remaining issues were issues of law. The Court's present decision renders moot the State's motion to dismiss.

DISCUSSION

The Petitioner alleged four grounds for post-conviction review. In his first ground, the Petitioner alleged that the police fabricated evidence. This is not a valid ground for post-conviction review. In his second ground, the Petitioner alleged that his prior conviction for Operating under the Influence and Manslaughter occurred outside the ten year sentence enhancement period under 17-A M.R.S.A § 9-A (Supp 2004). Read with

the requisite liberality, this ground alleged an illegal or unconstitutional sentence, which was a valid ground for post-conviction review. 15 M.R.S.A. § 2125; Smith v. State, 479 A. 2d.1309, 1311 (Me. 1984). In his third ground, the Petitioner alleged that 29-A M.R.S.A. § 2411(6), amounted to an ex post facto law because it changed the sentencing enhancement period after his initial Operating Under the Influence and Manslaughter convictions. Read with the requisite liberality, this ground alleged an illegal or unconstitutional sentence which was a valid ground for post-conviction review. Id. In his final

ground, the Petitioner alleged that the "Superior Court system" did not allow him to argue the merits of his Motion to Dismiss and further that the "system" coerced his guilty plea. Read with requisite liberality, this ground alleged ineffective assistance of counsel, which was a valid ground for post conviction review. State v. Huntley, 676 A. 2d 501.503 (Me. 1996).

I. Was the Court's sentence illegal because it was enhanced by a conviction that fell outside the ten-year period provided in 17-A M.R.S.A. § 9-A?[4]

The Petitioner argues that the court illegally enhanced his sentence for Operating Under the Influence, because of a later enacted statute, to wit: 17-A M.R.S.A. § 9-A(3). The statute became effective on January 31, 2003, approximately two years after the Petitioner was charged with Operating Under the Influence (Class C). The statute establishes a 10 year "look back" limitation period for utilization of prior convictions to enhance a sentence, *except as otherwise provided by law.* The Petitioner argues that the 2003 statute should be applied retroactively to his case pursuant to Teague v. Lane, 489 U.S. 288 (1989). In this court's opinion, the Defendant's reliance on Teague to establish

[4] While the Petitioner is no longer incarcerated pursuant to the 2001 OUI conviction, the Petitioner nonetheless fulfills the direct impediment requirement of 15 M.R.S.A. § 2124(1) (E) (Supp. 2004), as there is an outstanding fine.

retroactive application of the statute is misplaced. Teague held that newly declared rules of criminal procedure that are of *constitutional* origin do not apply to cases where the defendant's conviction became final and where the case is before the court on collateral review, (such as in a post conviction proceeding), except in two circumstances that are discussed infra. Those circumstances are limited to those new rules that "place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" and to those new rules that amount to "watershed declarations that are "implicit in the concept of ordered liberty." Teague at 307. Aside from Teague's observation that "retroactivity" is a threshold consideration, this court fails to see how Teague supports the Petitioner's claim that § 9-A should be retroactively applied to this case. The Petitioner argues that Teague should apply to new *legislative* rules of criminal procedure as well as to *adjudicated rules* of criminal procedure. He points to a number of cases that have addressed the retroactivity principle and quotes from Teague as follows:

> "selective application of new rules violates the principle of treating similarly situated defendants the same, we refuse to continue to tolerate the inequity that resulted from not applying the new rules retroactively to defendants whose cases had not yet become final." Teague at 304.

APPENDIX A

He quotes again from Teague at 304, 305:

> "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exceptions for cases in which the new rule constitutes a clear break with the past."

He then asserts that his case is on direct review in this proceeding. It is not. This is a post conviction proceeding, it is not an appeal affording direct review of the underlying criminal judgment. The Petitioner relies on Teague's general discussion of retroactivity

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principles first expressed by Justice Harlan and later incorporated into Teague's majority opinion by Justice O. Connor. The passages quoted are well established legal principles, however, they are part of the discussion of retroactivity in cases that are not yet final, i.e. where the appellant's right of appeal has not yet exhausted. By statutory definition, a post conviction proceeding is a proceeding that affords collateral review, not direct review, of convictions that have become final and where all other means of review have been exhausted. See 15 M.R.S.A. § 2126. In this case, the Petitioner pled guilty on January 16, 2002 and because there was no possible decisional error he had no right of appeal except to raise jurisdictional challenges or constitutional questions pertaining to excessive, cruel or unusual

punishments.[5] Accordingly his conviction became final twenty-one days later on February 6, 2002.

However, even if Teague were to be applied to the 2003 version of section 9-A (3), its ten-year limitation would still not be applied retroactively. Teague establishes two exceptions to the rule that new rules of criminal procedure will not be applied retroactively to cases on collateral review that have become final before the new rules have come into effect.

First, "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' " Teague at 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971). This exception does not apply to this case, as the statute merely limited the time when a prior conviction could enhance a penalty for an OUI, it does not legalize manslaughter.

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Second, a new rule should be applied retroactively if it significantly increases the accuracy of fact-finding procedures or if the new rule is "implicit in the concept of ordered liberty." Id. at 312. The new ten-year statute can hardly be said to increase the accuracy of any proceeding. Its effect is to essentially impose a statute of limitations on the use of prior convictions, not to increase their accuracy. The verification of a prior conviction is easily accomplished with great accuracy. As to whether applying the new statute

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[5] See State v. Huntley, 676 A. 2d 501 (Me. 1996)

implicit in the concept of ordered liberty, the Petitioner has made no such argument and this court finds that the statute has more to do with judicial economy and convenience than it does with the concept ordered liberty. Section 9-A(3) should not be applied retroactively.

Finally, the Petitioner ignores the exception set forth in §9-A. The plain language of the statute states, "except as otherwise provided by law". This provision clearly allows the Legislature to provide a different limitation period or even no limitation period for prior criminal convictions that enhance sentences. This is exactly what the legislature did in 29-A M.R.S.A. § 2411 (6). There is simply no limitation on the age of the prior conviction for an alcohol or drug related motor vehicle homicide; any such prior conviction, regardless of age, has an enhancing effect. The Petitioner has not demonstrated any constitutional infirmity in such legislation.

II. Was the court's sentence illegal because it violated constitutional ex post facto prohibitions?

29-A M.R.S.A. §2411(6) was effective until July 1, 2004 and was used to enhance the Petitioner's sentence for Operating under the Influence. It stated that the

operator of a motor vehicle commits a Class C crime if the State pleads and proves that the operator had a "prior criminal homicide conviction

involving or resulting from the operation of a motor vehicle while under the influence of intoxicating liquor or drugs or with a blood alcohol content of 0.08% or greater."

The Petitioner argues that this statute violates both the ex post facto prohibitions pursuant to U.S. Const. Art. I § 10 and the recent U.S. Supreme Court ruling in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

A. Ex Post Facto

The Petitioner argues that "[a]pplying a new statute to a crime that is defined by behavior that occurred prior to the effective date of a statute violates ex post facto laws."

To Begin, § 2411(6) does not define the crime of Operating Under the Influence, it merely enhances the possible range of penalties by re-classifying the crime from Class D to Class C. However, more importantly, the application of section 2411(6) was not in violation of ex post facto prohibitions.

The U.S. Supreme Court in Stogner v. California, 509 U.S. 607, 612 (2003), stated that Justice Chase's categorization of ex post facto laws in Calder v. Bull, 3 Dall. 386, 390-391 (1798), has been recognized by the Court as "providing an authoritative account of the scope of the Ex Post Facto Clause." Id. at 611. Justice Chase wrote that there are four categories of ex post facto laws:

> 1st. Every law that makes an action done before the passing of the law, and which

> was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts
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> 7
>
> a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.
> Calder, 3 Dall. At 390.

First, section 2411(6) did not make the Petitioner' s previous Manslaughter conviction criminal. Second, section 2411(6) did not aggravate the prior conviction or make it greater than it was. Section 2411(6) did not enhance a previous crime, it merely enhanced the current crime because of a prior conviction. If this court were to adopt the proposition that a conviction is "aggravated" for the purposes of the Ex Post Facto Clause when it can merely be used to enhance a penalty for a later crime, then criminal histories could rarely be used during any sentencing. Such an interpretation of the U.S. Constitution would yield absurd far-reaching results. Third, section 2411(6) changed the punishment for a current OUI, it did not reach back and alter the penalty for the Manslaughter conviction. Finally, the fourth requirement is simply not applicable to this case.

Section 2411(6) did not violate ex post facto prohibitions.

B. Apprendi

The Petitioner also argues that the Supreme Court's decision in Apprendi and the Law Court's later adoption of Apprendi in State v. Hodgkins, 2003 ME 57; 822 A.2d 1187, renders his sentence illegal. Apprendi ruled that *"[o]ther than the fact of a prior conviction,* any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490 (emphasis added).

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Here, the fact decided by the court was a prior conviction and, thus, falls within the express exception laid out in Apprendi. It was not improper for the Petitioner's prior conviction to have been determined by the court. This court is not required to engage in the ''element'' versus "enhancement factor'' analysis put forth by the Petitioner as Apprendi is not applicable to this case.

III. Did the Petitioner receive ineffective assistance of counsel because his attorney failed to challenge, by post-conviction review, his 1989 conviction for Manslaughter and OUI.

The Petitioner was also the defendant in a wrongful death suit in Cumberland County in

Docket No. CV-89-1271, arising out of the same circumstances underlying his 1989 Manslaughter conviction. The civil jury issued a finding of fact that Robert Beale, the victim in the Manslaughter charge, was comparatively negligent and that his negligence was also a proximate cause of the accident. The Petitioner claims that his former attorney was ineffective when he failed to challenge, by way of post-conviction review, his 1988 Manslaughter conviction based on this new finding.

However, post-conviction review is a method of review of legality of post-sentencing proceedings. 15 M.R.S.A. § 2121(2) (Supp. 2004). The Law Court in McEachern v. State, 456 A.2d 886 (Me. 1983), found that an allegation of ineffective assistance of counsel in a previous post-conviction review proceeding deprived the court of jurisdiction because a previous post-conviction review proceeding is not a "post sentencing proceeding." Id at 890. If an allegation of ineffective assistance of counsel in a post-conviction review proceeding is not within the court's jurisdiction, surely an

allegation of ineffective assistance of counsel in an alleged failure to pursue such a petition is also beyond the court's jurisdiction.

IV. Did the Petitioner receive ineffective assistance of counsel because his second attorney failed to pursue his motion to dismiss?

APPENDIX A

Our courts have long recognized the crucial role that defense counsel play in ensuring that fairness and justice prevail within our criminal justice system and that the constitutional right to counsel means the right to "the effective assistance of counsel". (See LeFerriere v. State of Maine, 1997 ME 169, 697 A.2d 1301). Maine law has developed the following two-part standard by which courts determine whether a person has been afforded or denied his constitutional guarantee of counsel in a case where that person has previously entered a guilty plea. In Aldus v. State of Maine (2000 ME 47, 748 A 2d. 463), the Law Court declared that a person who sought to avoid his criminal conviction based on a claim of ineffective assistance of counsel and who had previously plead guilty had the burden of proving each of the following:

> 1. That the performance of the Defendant' s attorney fell below that of an ordinary fallible attorney and
>
> 2. That there is a reasonable probability that, but for [his] attorney's error, the defendant would not have entered a guilty plea and would have insisted on going to trial. Id ¶13

These two bases have come to be known as the "performance" prong and the "prejudice" prong. Both must be proven in order to prevail on a

petition for post-conviction review premised on ineffective assistance of counsel.

> The Law Court also noted,
> "... our inquiry is whether the plea proceeding produced a just result which is the "knowing and voluntary entry of a guilty plea by a guilty party." Thus, in making the determination of whether counsel was
> 10
> ineffective, we and the trial courts must be guided by the overall justness and fairness of the proceeding. Id ¶*15*

The Petitioner also argues that his former attorney was ineffective because he failed to pursue his two motions to dismiss. The first motion was filed by Attorney William Maddox and argued that section 2411(6) was an ex post facto law. As noted above, such an argument is without merit and would nave failed. Therefore, the Petitioner was not prejudiced by any failure on his former Attorney's part to pursue this motion.

The Petitioner also filed a second motion to dismiss pro se. In this motion, he argued that 17-A M.R.S.A. § 1 (2000) required that all elements of a crime must occur prior to the effective date of any statute under the Maine Criminal Code. As the Petitioner's Manslaughter conviction occurred before § 2411(6) was effective, the Petitioner argued that it's application to the 2001 OUI conviction violated 17-A M.R.S.A § 1. However,

§ 1 merely states that crimes occurring before the enactment of the Maine Criminal Code in 1976 were to be governed by the prior law and vice-versa. It has no implication here. In the court's opinion, the Petitioner's second pro se motion to dismiss would have failed and accordingly he was not prejudiced by any alleged failure by his former attorney in pursuing it.

CONCLUSION

Accordingly, the Petitioner's request for relief in his petition for post-conviction review is **DENIED.** The State's Motion to Dismiss the petition is moot.

Dated: January 12,2006

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E. Allen Hunter
Justice, Superior Court

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STATE OF MAINE — SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Docket No. Kno-06-213

Donald D. Chisholm, *Petitioner*

v.

STATE OF MAINE, *Respondent*

MEMORANDUM IN SUPPORT OF CERTIFICATE OF PROBABLE CAUSE TO APPEAL

NOW COMES Petitioner, Pursuant to M.R. App. P 19, and prays that this Honorable Court will grant a certificate of probable cause to appeal in consideration of the facts and law below.

BRIEF HISTORY OF THE CASE

In 1987, on October 3 at approximately 10:05 P.M. a Robert Beale and Petitioner, Donald D. Chisholm were operating motor vehicles on Commercial Street (Route 1A) in Portland, Maine. Robert Beale was northbound and Donald Chisholm was southbound. Those vehicles collided on a curve in the roadway in vicinity of the Million Dollar Bridge. Robert Beale was killed instantly. Donald Chisholm survived with minor injuries. An investigation by the Portland Police Department resulted in vehicular manslaughter charges (Cum CR-87-1955) being brought against the survivor of the collision, Donald Chisholm. After a jury-waived trial Justice Paul Fritzsche found Donald Chisholm guilty of operating under the influence and

manslaughter and sentenced him to Department of Corrections for eight years, all but six suspended, four years probation, a driver's license suspension of six years and a fine of one thousand dollars. The conviction was appealed to the Maine Supreme Court and affirmed.

On November 10, 2000 in Edgecomb, Maine the Petitioner, Donald Chisholm, the same person convicted in CR-87-1955 above, was arrested and charged with operating under the influence (WISSC CR-2001-048). This indictment was brought in accordance with 29-A M.R.S.A. § 2411(6)(B) effective in July of the year 2000. After consultation with an Attorney of the Maine Bar Association and after completing a Rule 11 Hearing before Justice E. Allen Hunter, Donald Chisholm, the current pro se petitioner, plead guilty to the November 10, 2000 OUI charge. This Rule 11 Hearing was conducted on January 16, 2002.

I was granted a stay of execution of sentence[1] until February 18, 2002 and in that period did some independent research into the nature of the charges to which I had plead guilty. The reason for the research was that I was still unsatisfied with the explanation from legal counsel as to the exact nature of the charge to which I had plead guilty.[2] That research resulted in my writing a letter to the sentencing Judge[3] venting my frustration over what I saw as a less than acceptable Rule 11 Hearing on January 16th, 0f 2002. I

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[1] 3 years Department of Corrections, all but 8 months suspended, 6 years license suspension and $2000 fine.

[2] There will be further discussion concerning a then pending Motion to Dismiss that had been filed pro se and counsel's advice as to the definition of the prior conviction factor and the legal implications of that definition.

[3] Appendix item A (this document)

APPENDIX B

nevertheless reported to the Department of Corrections as ordered.

On December 24, 2002 I filed a motion to reverse the sentence rendered at the Rule 11 Hearing of January 16, 2002. That motion was filed under M.R. Crim. P. 35.[4] On June 13, 2003 Judge E. Allen Hunter issued an "ORDER" denying the motion under rule 35. Justice Hunter stated in the order that "Chisholm does not raise any valid arguments concerning Rule 11" and that the other issues were "not valid grounds for a Rule 35 Motion."

The LAW COURT denied an application for a certificate of probable cause to appeal the "ORDER" on Rule 35 on September 15th, 2003. In so doing the Judge, Robert W. Clifford, wrote: "it is apparent that the appeal does not raise any issue worthy of being fully heard"[5] Despite this statement the ORDER DENYING CERTIFICATE OF PROBABLE CAUSE, in the third paragraph, opts to list what was proposed to be an issue raised regarding an ex post facto argument. I had never proposed that 29-A M.R.S.A. §2411 (6) (B) "is an unlawful ex post facto law" as stated in that document from Judge Clifford. A letter addressing this misrepresentation was mailed to Judge Clifford on September 30, 2003.[6]

While the Rule 35 Motion was pending in Lincoln County I had taken further action in Cumberland County regarding the prior conviction element of Wisc 01-48, Cr-87-1955. I had filed a post conviction review action in accordance with M.R.S.A. 305-A 3, B(2) on January 13,

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[4] See Appendix Item B (this document). ISSUES listed in Motion 35 of December 24, 2002, copy of issues page.

[5] See Appendix C (this document) for ORDER DENYING CERTIFICATE OF PROBABLE CAUSE

[6] See Appendix Item D (this document).

APPENDIX B

2003. It was my belief that a post-conviction action under this section should be filed in the Court and County of original jurisdiction. However, the clerk of Cumberland County returned the petition to me with instructions that it should be filed in Lincoln County Superior Court. I promptly filed the petition with Lincoln County as instructed. It was later incorporated into a single post-conviction review petition, which included additional issues for review. Process of the post-conviction review petition began on September 13, 2003 upon the denial from the LAW COURT of the certificate of appeal on the Rule 35 motion. After two oral hearings and more than two years, finally, on January 12, 2006 Justice E. Allen Hunter issued the "DECISION AND ORDER" denying the relief requested. Now I am requesting that the LAW COURT grant a certificate of probable cause to appeal this latest DECISION AND ORDER.

ISSUE BY ISSUE REASONS WHY CERTIFICATE OF PROBABLE CAUSE TO APPEAL SHOULD BE GRANTED (IN SEQUENCE WITH JUDGE HUNTER'S DECISION AND ORDER)

"DISCUSSION" page 2 "DECISION AND ORDER"

"In his first ground, the Petitioner alleged that police fabricated evidence".

As described above, in the history of the case, I had filed a petition for post- conviction review with the Court of original jurisdiction in the manslaughter case (CUM CR-87-1955) in accordance with M.R.S.A. 305-A 3, B(2). Cumberland returned it and instructed that it be filed with Lincoln County. Upon filing the petition with Lincoln

County I was further instructed that all post-conviction review issues needed to be filed in the form of a generic application and I was provided with that application. In the application it instructs that petitioner list all issues intended to be raised or risk that the issue will not be heard in due process of the case. I, therefore, included my contention that Portland Police Officers investigating the accident in CUM CR-87-1955 had fabricated evidence in the investigation. As I was incorporating a review of the prior conviction element, CR-87-1955, as part of a petition in Wisc-CR-01-048, I listed it off the top of my head. In completing the form it was a little confusing merging all the issues involving both the prior conviction element and the current behavior element in one petition and the issue of evidence fabrication would have been an evidentiary matter had a hearing ever occurred in review of CR-87-1955. It never did and this issue is inconsequential to this request for a certificate of probable cause.

"DISCUSSION" pages 2-3 "DECISION AND ORDER"

"In his second ground, the Petitioner alleged that his prior conviction for Operating under the Influence and Manslaughter occurred outside the ten-year sentence enhancement period under 17-A M.R.S.A. §9-A (Supp.2004)"

"I. Was the court's sentence illegal because it was enhanced by a conviction that fell outside the ten year period provided in 17-A M.R.S.A § 9-A ?"

I found the enactment of 17-A M.R.S.A § 9-A interesting. I started to communicate with the legal

department of the Maine Criminal Justice Committee by e-mail in the year 2001, prior to the Rule 11 Hearing of January 16, 2002. My inquiries were to the history of LD 2406.[7] I was provided with original committee notes, including notes from a public hearing involving the legislation. The legislation was finally enacted as 29-A M.R.S.A. §2411(6) (B), effective several weeks prior to my November 10, 2000 OUI charge. What I discovered through this research was that LD 2406 originally contained language that specifically limited the attachment of a prior manslaughter conviction to a current OUI offense to within 10 years. However, the final draft of the legislation and the language of the statute did not refer to a 10 -year period. The notes from the criminal justice committee referred to testimonials from the public hearing on the legislation. Those testimonials from interested public speakers and from District Attorney Crook argued against any limit on the "look back period". One could conclude from this information that the final version of the bill and the legislation intentionally included no expressed 10- year period. I continued to communicate with the criminal justice committee after I began to serve the prison sentence for the Wisc-01-048, OUI. I expressed to them my concerns for the new statute under which I had been convicted. Those concerns involved the nature of the offense and alcoholism. I expressed the belief that a large percentage of the people convicted of OUI were alcoholics and that the disease by nature involves relapses. I expressed my belief that it is cruel and unusual punishment to significantly enhance, by statute, a sentence for OUI by attaching a manslaughter conviction that may have occurred many years prior to the current

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[7] The legislation that attached a prior manslaughter conviction to a current OUI offense.

offense. The individual charged may have had many years of successful sobriety and no criminal offenses of any kind and that to have an indefinite look back period may be counter-productive to the individual's success with the disease while having no substantial effect on public safety.

I do not know what prompted the legislature to pass 17-A M.R.S.A § 9-A in the 2003 session, but I believe they intended to clarify any ambiguous statutes involving the attachment of prior convictions to raise sentences. I searched the statutes for such ambiguities and could find no statute more ambiguous than the one at hand, 29-A M.R.S.A. § 2411(6) (B). It is possible that the legislature, in consideration of the testimonials at public hearing, removed the original 10-year stipulation in LD 2406. It is also possible that they later thought better of it, prompting 17-A M.R.S.A § 9-A. In interpreting ambiguous statutes there are precedents. "Criminal statutes must be construed strictly with ambiguities resolved in favor of accused". STATE v. WILDER. Docket No. Cum-99-392. Argued Jan. 4, 2000. Decided Feb. 24, 2000. citing United States v. Bowen, 127 F.3d 9, 12 (1st Cir.1997); State v. Ashby, 1999 ME 188, & 6, 743 A.2d 1254. It may be common knowledge, as expressed by Judge Hunter under this issue, that "There is simply no limitation on the age of the prior conviction for an alcohol or drug related motor vehicle homicide, any such prior conviction, regardless of age has an *enhancing effect.*", however, his ruling is the first I've seen. He cites no precedent or statute in support of this ruling. If M.R.S.A §9-A does not control 29-A M.R.S.A. § 2411(6) (B), which statutes does it control? If it applies to no statute than the legislation was mere surplusage. There is precedent regarding legislative surplusage., "[N]othing in a statute may be treated as surplusage if a reasonable construction

applying meaning and force is otherwise possible." Struck v. Hackett, 668 A.2d 411, 417 (Me.1995) STATE v. HARRIS. Me. 730 A.2d 1249 1999 ME 80.

Justice Hunter did spend several pages analyzing the retroactive application of such new rules. The key case of Teague v. Lane, 480 U.S. 288 (1989) was considered in some detail, however, the follow-up case of SCHRIRO v. SUMMERLIN Cir.9th No. 03-526 argued April 19, 2004, decided June 24, 2004 was not. I presented SCHRIRO at oral hearing and that case extended the retroactive application of new rules to cases on collateral review when; the rule addresses "substantive issues", "rules that narrow the scope of a criminal statute by interpreting its terms" Bousley v. United States, 523 U.S. 614, 620-621(1998), rules "that place particular conduct or persons covered by the statute beyond the State's power to punish, see Saffle v. Parks, 494 U. S. 484, 494B495 (1990)", and " A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes.", which is the situation with M.R.S.A § 9-A.

The issue of retroactive application of new rules in regards to 17-A M.R.S.A § 9-A becomes significant only if the new rule applies to 29-A M.R.S.A. § 2411(6) (B), independent of whether a case is on direct or collateral review. If the LAW COURT knows that the new rule does not apply to this statute it may be desirable to eliminate any confusion over it by hearing this case and issuing a precedent. I pray that a ruling is forthcoming. If 17-A M.R.S.A § 9-A does apply to 29-A M.R.S.A. §2411(6) (B), than further consideration of SCHRIRO v. SUMMERLIN Cir.9th No. 03B526 and retroactivity may be required.

APPENDIX B

"II. Was the court's sentence illegal because it violated constitutional ex post facto prohibitions?"

I have filed numerous memorandums with the Superior Court in both the Rule 35 motion, Lin-03-466 and in the current post-conviction petition, Cr-01-017. I did not intend to, nor do I believe I ever did, take the position that 29-A M.R.S.A. § 2411(6) (B) was "in violation of the ex post facto clause, U.S. Const. Art I. § 10 and the recent U.S. Supreme Court ruling in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)" as stated by Judge Hunter at page 7 under "II[8]. Judge Hunter nearly states my position correctly under "A. Ex post facto" at page 7. "The petitioner argues that '[a]pplying a new statute to a crime that is defined by behavior that occurred prior to the effective date of a statute violates ex post facto laws' ". Judge Hunter states " To begin, 29-A M.R.S.A. § 2411(6) (B) does not define the crime of operating under the influence, it merely [emphasis added] *enhances* the possible range of penalties by re-classifying the crime from class D to C". The language, "*new substantive offense*" and "*a crime being defined by its elements*" and "*element*" and "*enhancement factor*" is language arising from every relevant case on the subject of "enhancing" sentences since McMillan v. Pennsylvania , 477 U.S. 79 (1987) and any case referenced by McMillan. The U.S. Supreme Court from McMillan to Apprendi v. New Jersey, 530 U.S. 466 (2000) has provided the language and terminology needed to proceed with any discussion of factors that increase sentences. The Maine Supreme Court

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[8] Justice Robert W. Clifford, Associate Justice of the Maine Supreme Court has made a similar statement in the one page "ORDER DENYING CERTICATE OF PROBABLE CAUSE" , from Lin-03-466 , rule 35 motion.

has cited Apprendi in State v. Hodgkins, No. Docket: Oxf-02-413 (Me. 04/24/2003), "facts that expose a defendant to a punishment greater than that otherwise legally prescribed [are] by definition 'elements' of a separate legal offense." A separate legal offense became effective in July of 2000 with passage of LD 2406 in the Maine legislative session. That new substantive offense was 29-A M.R.S.A. § 2411(6) (B). The offense consists of two elements; a prior conviction element of vehicular homicide while under the influence of an illegal blood alcohol level and the element of a current behavior of operating under the influence. The fact that the classification of crime changes from a Class D to a Class C is the standard that the U.S. Supreme Court has adopted in labeling a sentencing factor as an "element of a new separate offense" and not "merely" an enhancement as proposed by Judge Hunter. The constitutional impact is significant.

I believe it necessary to briefly reference Judge Hunter's DECISION AND ORDER out of sequence. I need to move from the middle of page 7 to paragraph 1 of page 9. Judge Hunter states 'This court is not required to engage in the "element" verses "enhancement factor" analysis put forth by the Petitioner as Apprendi is not applicable to this case.' With this statement in mind I would return to the middle of page 7 of the DECISION AND ORDER. Judge Hunter begins a review of the watershed case law of the ex post facto clause and offers this very narrow language from Stogner v. California, 509 U.S. 607, 612 (2003) and Calder v. Bull, 3 Dall 386,390-391(1798) as the current standard in determining ex post facto violations. If Judge Hunter has chosen not to engage in an analysis of "elements" verses "enhancement factors" there is no reason to engage in an analysis of the constitutional implications of 29-A M.R.S.A. § 2411(6) (B). This statute has no ex post facto implications

if the prior criminal homicide conviction is "merely" an enhancement factor. There are ex post facto implications only if the prior criminal homicide is an "element of a new separate offense" and a sentence is administered for that offense as "defined" by its elements. I do not believe there can be any rational discussion of ex post facto without first reaching a conclusion concerning what constitutes the elements of the offense charged in Lin CR-01-048, State v. Chisholm (2001). At that point I would need to address the well seated general conclusion, in both the U.S. Supreme Court and Maine Supreme Court case law, that in recidivist cases sentences attach only to the current behavior and not to prior convictions and are therefore not subject to the ex post facto or double jeopardy clause of the U.S. Constitution. That analysis would involve a comparison of recidivist criminal statutes that were in place when the prior conviction element or enhancement factor occurred and recidivist statutes that were enacted after the prior conviction element or enhancement factor occurred. There is a long line of applicable case law including MILLER v. FLORIDA, 482 U.S. 423 (1987). This and other cases discuss statutes and sentencing guidelines that change the "legal consequences" of prior conviction elements of crimes.

The remainder of "II A. pages 7-8" of Judge Hunter's DECISION AND ORDER continues to discuss the ex post facto clause in the context of a prior conviction as a "*sentencing enhancement*". I completely agree with his statement; 'If this court were to adopt the proposition that a conviction is "aggravated" for the purpose of the Ex Post Facto Clause when it can merely be used to enhance a penalty for a later crime, then criminal histories could rarely be used during any sentencing. Such an interpretation of the

U.S. Constitution would yield absurd far-reaching results.' I absolutely agree.

"B. Apprendi"

I believe that Judge Hunter's application of Apprendi to this case, Chisholm, and his interpretation of my application of Apprendi to this case is in obvious error.

First, I largely depend on Judge Thomas's concurring opinion. I consider his historical analysis of prior convictions as elements of crimes as a precursor to a further delineation of the principles and standards established in the case. McMillan v. Pennsylvania , 477 U.S. 79 (1987) through Apprendi v. New Jersey, 530 U.S. 466 (2000) have set a standard as to what sentencing factors deserve the full application of constitutional protection. I believe it is well established by these precedents that any sentencing factor that increases the punishment available for a crime is in fact an element of the crime and entitled to full constitutional protection. The only aspect of this protection to which prior conviction elements are exempt has been clearly stated in Apprendi and is accurately quoted by Judge Hunter as follows:

> "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

I have never taken the position in any filing with the Superior Court of Lincoln County that the prior conviction element of Chisholm "must be submitted to a jury, and

proved beyond a reasonable doubt." However, there is nothing in Apprendi that exempts prior convictions from all other constitutional protections including the ex post facto clause. There is no statement in Apprendi, or any prior U.S. Supreme Court Ruling, that exempts prior convictions as elements of crimes when the prior conviction causes the statutory maximum sentence to be raised. I do not believe that any jurist adequately familiar with the line of U.S. Supreme Court cases and Maine Supreme Court cases that address prior convictions as sentencing factors could conceivably conclude that prior convictions have been exempted as elements of crimes as Judge Hunter has proposed.

"III. Did the Petitioner receive ineffective assistance of counsel because his attorney failed to challenge, by post-conviction review, his 1989 conviction for Manslaughter and OUI?"

By statutory right, I was entitled to a post-conviction review of the prior vehicle manslaughter conviction, if legitimate grounds existed and it was my desire to pursue that defense[9]. That right is given by the legislature in M.R.S.A. Title 15, Chapter 305-A. 15 § 2124, section 3 (C). "C. A pending trial or any of the restraints or impediments specified in subsection 1 following a criminal judgment in

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[9] Judge Hunter ordered and received an affidavit from Attorney Thomas Hallett, the defense attorney in Cr-87-1955 and Cv-89-1271, the criminal and civil proceedings that resulted from the manslaughter indictment of 1987. Hallett expressed the opinion that a sufficient factual and legal basis existed to justify a post-conviction review of the prior conviction element of Lin CR-01-048. The affidavit is included in the record of the case.

this State, another state or in a Federal Court for a crime for which proof of the criminal judgment of this State that is challenged constitutes an element of the subsequent crime."

This statute acknowledges that a criminal judgment can constitute an element of a subsequent crime. As Lin-CR-01-048, State v. Chisholm, incorporated a prior vehicular manslaughter conviction as an element of the charging instrument, M.R.S.A. Title 15, Chapter 305-A. 15 § 2124, section 3 (C) was available as an affirmative defense to the charge. Despite my insistence that this defense be pursued, my attorney refused to initiate the petition without providing any legal basis for the refusal.

Judge Hunter has cited McEachern v. State, 456 A 2d. 886 (Me. 1983). He paraphrases the case in stating "The LAW COURT found that an allegation of ineffective assistance of counsel in a previous post-conviction review proceeding deprived the court of jurisdiction because a previous post-conviction review proceeding is not a "post sentencing proceeding". There was never a "previous post-conviction proceeding" in Lin -Cr-01-048. I have claimed ineffective assistance of counsel in that the attorney failed to pursue a legitimate and very justifiable defense to the class C charge in Lin-CR-01-048. Judge Hunter had already ruled in a preliminary hearing that an ineffective assistance of counsel claim was a legitimate issue under the post conviction review statute.

Independent of the attorney's failure to pursue that legitimate defense, I personally filed a petition for post-conviction review with Cumberland County in accordance with M.R.S.A. Title 15, Chapter 305-A. 15 § 2124, section 3 (C) on January 13th, 2003. As stated above it was moved to Lincoln County at the direction of Cumberland County

Superior Court. I believe that petition met the prerequisites under "restraints and impediments" as described in subsection 1 of Chapter 305-A. 15 § 2124. That petition is part of the record being transferred to the LAW COURT now. I fully expected this separate petition, originally filed in Cumberland, to be incorporated into this proceeding and it was. At oral hearing at the Penobscot County Superior Court[10], Judge Hunter informed the State of Maine, District Attorney Geoffrey Rushlau, and Petitioner Chisholm that the record of CR-87-1955 and Cv-89-1271 was in the Court's possession as a clerk carried stacks of filings into the courtroom and placed them on the Judge's bench. Judge Hunter has issued no ruling on the portion of the current petition that challenges the constitutionality of the prior criminal conviction element of CR-01-048.

"IV. Did the Petitioner receive ineffective assistance of counsel because his second attorney failed to pursue his motion to dismiss?"

I do not doubt that Judge Hunter has accurately presented the standards for determining a claim of ineffective assistance of counsel, under the circumstances of a plea of guilty.

I take particular interest in item "2." of the Aldus standard. As evidenced by my letter[11] to Judge Hunter within days following the Rule 11 hearing, I had problems with the legal advice Attorney Purdy had offered regarding the definition of the term "element of a crime". I had expressed that dissatisfaction to Judge Hunter when he asked me in the

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[10] The LAW COURT has ordered those transcripts per the notice of March 31, 2006.

[11] Appendix Item A.*(this document)*

course of the Rule 11 hearing if I understood and was aware of each element of the crime for which I was pleading guilty. At that point in the proceeding Judge Hunter ordered a recess so that I could confer further with Attorney Purdy. In conference with Attorney Purdy I made one definitive statement. "If you guarantee me that the prior conviction for manslaughter was not an element of the crime as the term is used in 17 A- M.R.S.A. §1 and as presented in my motion to dismiss I will plea guilty here today. If you can not make that guarantee I will cancel this proceeding and proceed to trial". Attorney Purdy stated that the vehicular manslaughter charge was not an element of the crime in the meaning of 17 A-M.R.S.A. §1 as quoted in my motion to dismiss. Court re-adjourned and I entered a guilty plea.

I do not believe that Attorney Purdy intentionally mis-represented the law. I do believe that he was not sufficiently familiar with the law of the case to differentiate between prior convictions that are "enhancement factors" and those that are "elements of the crime". Without that understanding Attorney Purdy was in no position to advise me either way. Does that fall below an acceptable standard of representation. I don't know. What I do know is that the Maine Rules of Criminal Procedure direct a Judge presiding over a Rule 11 hearing to ascertain whether a defendant understands each element of the crime for which he is pleading guilty. At the top of page 9 of the DECISION AND ORDER under "B. Apprendi" Judge Hunter clearly states "This court is not required to engage in the 'element' versus 'enhancement factor' analysis put forth by the Petitioner as Apprendi is not applicable to this case." I have already criticized Judge Hunter's application of Apprendi principles above. But what this quote clearly establishes is that Judge Hunter has not engaged in the "element" verses

"enhancement factor" analysis as the U.S. Supreme Court has so properly and articulately done from McMillan v. Pennsylvania , 477 U.S. 79 (1987) to Apprendi v. New Jersey, 530 U.S. 466 (2000). Without having done so either prior to the Rule 11 hearing or since, it is impossible that Judge Hunter could have ascertained whether I understood the elements of the crime for which I was pleading guilty. The requirements of the Maine Rules of Criminal Procedure were not fulfilled at the Rule 11 hearing.

In the first paragraph of page 11 of the DECISION AND ORDER Judge Hunter refers to a motion to dismiss by attorney Maddoxx. As I was unaware that Attorney Maddoxx had such a motion pending and still am. I could not very well claim that Attorney Purdy should have pursued it.

Lastly, I believe that Judge Hunter has mistakenly and erroneously represented the Maine Criminal Code in the last paragraph of the DECISION AND ORDER. 17-A M.R.S.A § 1 The Maine Criminal Code, Title 17-A, Part 1, Chapter 1, 1 provides at (1) that

> "When it is alleged that an element occurred on or about any date prior to the effective date of the code, the prosecution shall be governed by the prior laws."
>
> and (2) that
> "For purposes of this section, a crime was committed subsequent to the effective date if all of the elements of the crime occurred on or after that date; a crime was not committed subsequent to the effective date if any element thereof occurred prior to that date, or if the evidence may reasonably be interpreted to establish that any element may have occurred prior to

that date. [1981, c. 324, 1 (amd).](emphasis added).@

and (6) that

"Application to crimes outside the code

1. The provisions of Parts 1 and 3 and chapter 7 are applicable to crimes defined outside this code, unless the context of the statute defining the crime clearly requires otherwise. [1989, c. 502, Pt. D, 9 (amd).]"

and 17-A Chapter 4, section 1

"Criminal statutes drafted in the future must conform as closely as possible to the general principles and guidelines set out in the code. Therefore, the Maine Criminal Code should serve as the basic model for drafting any proposed statute that deals with crimes, civil violations, or civil penalties."

The "code", of course, is "statutes". The "general principle" is that all elements of a crime must occur on or after the effective date of a statute.[12] As stated above by the drafters of the group of statutes referred to as the criminal code, the principles and provisions of the code apply to crimes defined outside the code, and to "statutes drafted in the future".

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[12] This general principle is consistent with the ex post facto clause of the U.S. Constitution, and all precedents in common law including Stogner v. California, 509 U.S. 607, 612 (2003) and Calder v. Bull, 3 Dall 386,390-391(1798)as cited by the current **DECISION AND ORDER**.

These are the words of the Maine Legislature. Judge Hunter has stated "§ 1 merely states that crimes occurring prior to the enactment of the Maine Criminal Code in 1976 were to be governed by the prior law and visa versa." These are the words of Judge Hunter, without reference to any of the words from the Maine Legislature who drafted the law and principles in the code and without reference to any Maine Law Court Rulings.

I'll admit common law rulings in this regard are scarce. In fact the only one I can find is State v. Clarke, 396 A. 2d 228(Me. 1979). It involves 7 M.R.S.A.§ 3451, which in Clarke at 3 is described as a statute which "was [were] not repealed by the code" which became effective on May 1, 1976. It was decriminalized on October 24, 1977 in 17-A M.R.S.A. § 4-A (4)(Supp.1977). As with this section, sections of 17-A M.R.S.A. have been repealed and rewritten, and behaviors criminalized and de-criminalized, with every legislative session since the effective date of the code. Clarke instructs in "[18]" to "insert § 4-A(4) into the first sentence of § 1(2) so that it then reads "§ 4-A 'shall become effective [October 24, 1977] and shall apply only to crimes committed subsequent to its effective date". The principles of 17-A M.R.S.A § 1 has stated that a crime is defined by its "elements", and all elements must occur on or prior to effective date of the statute defining the crime. McMillan v. Pennsylvania , 477 U.S. 79 (1987) through Apprendi v. New Jersey, 530 U.S. 466 (2000) has stated the same principle. Justice Thomas's concurring opinion in Apprendi has given the historical basis for treating prior convictions as elements of the crime. Therefore, that basis existed prior to the effective date of the Maine Criminal Code. Apprendi has set the standard for deciding which prior convictions are

"elements" and which are not. In the case of 29-A M.R.S.A. §2411(6) (B) a "new separate offense" of OUI became effective in July of 2000. The elements of the Chisholm offense was a vehicular homicide conviction in 1988 and a subsequent OUI in November of 2000. In Maine Law, as stated in the principles and law above, all elements of the crime did not occur subsequent to the effective date of the statute defining the "new separate offense". In U.S. Supreme Court Law, i.e. Apprendi, there has been no exception made for prior convictions as applied to the ex post facto clause. The punishment of a criminal offender does not attach to a prior conviction used to enhance a current offense, however, I believe the U.S. Supreme Court would rule that punishment does attach to a prior conviction that reaches the level of an "element of the crime", per Apprendi. Accordingly, unless the subsequent punishment for a prior offense was already by statute in effect on the date of the prior offense, the consequences and punishment for that offense have been increased and this violates the ex post facto clause per Stogner v. California, 509 U.S. 607, 612 (2003) and Calder v. Bull, 3 Dall 386,390-391(1798) as cited by Judge Hunter.

Therefore, I believe that Judge Hunter's ruling that neither 17-A M.R.S.A. § 1 nor Apprendi apply to this case is in error.

CONCLUSION

I believe the following to be true:

1. There has been no due process in considering the post conviction review petition challenging the constitutionality of the prior vehicular manslaughter conviction, Cum CR-87-1955, nor did Judge Hunter ever rule on that challenge.

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2. There has been no due process in applying the principles of the Maine Criminal Code to this case. All elements of the new separate crime charged did not occur on or after the effective date of the new statute, 29-A M.R.S.A. § 2411(6) (B). There was ineffective assistance of counsel in his failure to gain a dismissal of the Class C crime on that basis.

3. The Court has in error failed to apply 17-A M.R.S.A. § 9-A to of 29-A M.R.S.A. § 2411(6) (B) as moved to do in this petition.

4. The Court, not knowing that the prior vehicular manslaughter conviction, Cum CR-87-1955, was an element of the crime charged could not possibly have informed the Defendant of all elements of crime for which he was being charged and to which he was pleading guilty and therefore the Rule 11 hearing should be null and void.

5. The court has failed to recognize or even consider the basis for an ex post facto argument in this case as supported by Spencer v. Texas, 385 U.S. 554 (1967), In Re Winship, 397 U.S. 358 (1970), Mullaney v. Wilbur, 421 U.S. 684 (1975), Patterson v. New York, 432 U.S. 197 (1977), Engle v. Isaac, 456 U.S. 107 (1982), Francis v. Franklin, 471 U.S. 307 (1985), Commonwealth v. Wright, 508 Pa. 25 (1985), McMillan v. Pennsylvania,477 U.S. 79 (1986), MILLER v. FLORIDA, 482 U.S. 423 (1987), Specht v. Patterson, 386 U.S. 605, Nichols v. United States, Certiorari to the United States Court of Appeals for the Sixth Circuit ,No 02-8556, (June 6, 1994) Almendarez-Torres v. United States, 523 U.S. 224 (1998) Jones v. United States, 526 U.S. 227 (1999),

Apprendi v. New Jersey No. 99-478 (2000) Supreme Court of United States.

Wherefore Petitioner, Donald D. Chisholm, prays that the certificate of probable cause to appeal to the full Supreme Court of Maine, Sitting as the Law Court, will be granted.

Signed this 21st day of April , 2006.

"_____"

Donald D. Chisholm
P.O. Box 1402
Rockland, Me. 04841
207-542-1952

APPENDIX B

Appendix Item "A"

Donald D. Chisholm
P.O. Box 120
Vinalhaven, Me. 04863

January 29, 2002

Honorable E. Allen Hunter
Justice Of the Maine Superior Court
P.O. Box 249
Wiscasset, Me. 04578

Re: State v. Chisholm, No. WISSC.CR-2001 -048

Dear Judge Hunter:

Please find copy of letter from the Public Defender, Daniel Purdy, to you dated January 6, 2002.

As of that time this case was intended for trial and a Motion to Dismiss was pending. As I stated to you at the hearing in accordance with M.R. Crim. P. 1IA on January 16, 2002, the police report was highly inaccurate. Despite that I did not contest the report on advise from Attorney Purdy.

Attorney Purdy also advised me that "Defendant', Donald D. Chisholm's Motion for Dismissal of Complaint for Operating Under Influence, Class C Title 29-A M.R.S.A. Sec. 2411(1) Docket No. CR-2001 -00086" which I filed Pro Se back in March of 2001 had no merit and would not be pursued because Maine Law does not consider a prior conviction to be an "element of the crime". This week I researched the issue as to whether Maine considers a prior offense an "element of the crime" when contained in the statute describing a crime

and discovered that Attorney Purdy was completely wrong. I have included on e recent case. LANDRY v STATE, 1990 ME, 575 A.2d 315.

Maine Law does consider a prior conviction an "element". My Motion to Dismiss had merit and was never ruled on by the Superior Court for nine months prior to the M.R. Crim. P. 1IA hearing.

The plea agreement did not include a contingency that the Motion to Dismiss be preserved for review by the Law Court. I will nevertheless file for permission to have the issues contained in the motion reviewed.

I find it hard to believe that an Attorney, Court Appointed or otherwise would advise a client-that a prior conviction when joined with a current offense is not considered an element of the crime. I find it hard to believe that a defendant can file a Motion to Dismiss in a timely manner and have no ruling for nine months. I understand that you were not sitting in Lincoln County during those 9 months and the motion never came before you.

This is very upsetting.

Yours Truly,
"_____"
Donald D. Chisholm

"1/30/2002
Receipt of letter noted. No Action required in response. Any further request for relief can be addressed in due course by presiding Justice.
E. Allen Hunter"

APPENDIX B

Appendix "B"

Topic Page Reference

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ISSUES AND LAW

I. THE CHARGES IN CR-2001-00086 (first ancillary complaint) and CR-01-048 (second ancillary complaint) DO NOT QUALIFY AS "ADDITIONAL CHARGES ARISING FROM THE ORIGINAL INCIDENT OR COURSE OF CONDUCT" AS DEFINED IN MAINE RULES OF CRIMINAL PROCEDURE RULE 3(A) AND THEREFORE THE STATE IS PROHIBITED FROM COMMENCING THE CHARGES UNDER A NEW DOCKET NUMBER OR OTHERWISE.
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II. EVEN IF THE COMMENCEMENT OF THE CLASS C COMPLAINT, CR-2001-00086 OR CR-01-048, WAS ALLOWED UNDER THE MAINE RULES OF CRIMINAL PROCEDURE RULE 3 (A), THE PRIOR CRIMINAL HOMICIDE CONVICTION, AS THE ESSENTIAL ELEMENT OF THE CLASS C FELONY CHARGE, OCCURRED PRIOR TO THE EFFECTIVE DATE OF THE STATUTE THAT ESTABLISHED THE CRIMINAL HOMICIDE AS AN ELEMENT AND THE CLASS C FELONY CHARGE CAN THEREFORE NOT BE SUSTAINED.....52-60

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APPENDIX B

Appendix Item "C"

STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court — Docket No. Lin-03-466

DONALD D. CHISHOLM Petitioner	)	
v.	)	ORDER DENYING
	)	CERTIFICATE OF
STATE OF MAINE Respondent	)	PROBABLE CAUSE

Pursuant to M.R. Crim. P. 35(f) and M.R. App. 19(a), the petitioner has filed a notice of appeal from an order of the Superior Court in the above-entitled proceeding denying a motion for correction or reduction of sentence, which notice by law constitutes a request for a certificate of probable cause.

Upon consideration of the proceedings in the Superior Court and any memorandum filed by the petitioner in support of his request for a certificate of probable cause, it is apparent that the appeal does not raise any issue worthy of being fully heard.

Petitioner alleges his sentence of three years for operating under the influence (OUI) Class C is illegal, and that 29-A M.R.S.A. § 241 1(6)(B), elevating an OUI conviction to a Class C offense based on a prior conviction, is an unlawful ex post facto law.

It is ORDERED that a certificate of probable cause to proceed with the appeal be and hereby is denied. It is FURTHER ORDERED that a copy of this order, together with the proceedings in the Superior Court now on file in this Court, be returned to the clerk of the Superior Court.

Dated:
"September 15, 2003

For the Court,

" _____ "
Robert W. Clifford
Associate Justice

"RECEIVED
Sep 16 2003
Supreme Judicial Court"

APPENDIX B

Appendix Item "D"

Donald D. Chisholm
P.O. Box 140
Vinalhaven, Me. 04863

Robert W. Clifford **September 20, 2003**
Associate Justice
Supreme Judicial Court
P.O. Box 368
Portland, Me. 04112-0368

RE: Docket No. Lin-03-466 "ORDER DENYING CERTIFICATE OF PROBABLE CAUSE" (copy) "it is apparent that the appeal does not raise any issue worthy of being fully heard"

Dear Honorable Sir:

It is easy to make such a statement when it is backed by no reference to law. It may be that the statement is so obviously true that no reference is required but that is not my belief. My belief is that common courtesy requires and all U.S. citizens deserve such a reference.

As to your "ORDER DENYING CERTIFICATE OF PROBABLE CAUSE" it surely misrepresents both my presentation of the issues and my dependence on the Maine Rules of Criminal Procedure, Maine Legislative Statutes and Maine common law rulings.

First, I filed a notice of appeal based on Maine Rules of Appellate Procedure, Rule 2 (a)(2) , 20 (i) and **State v. White, 2001 ME 65, ¶ 3, 769**. You were a concurring jurist in that case.

> **"A sentence of any length may be appealed as a matter of right where the defendant claims that the sentence is illegal, imposed in an illegal manner or beyond the jurisdiction of the court, where the illegality appears plainly in the record. "**

Jurisdiction was the issue from the time of the indictment until present. The issue may be unfounded but my presentation of it reflects a true representation of what my position has been. I formally raised the jurisdictional issue by motion prior to the Class C indictment. You have stated in your ORDER "petitioner alleges his sentence ...is an unlawful ex post facto law." Although I listed an ex post facto issue in order to preserve it for The Maine Supreme Judicial Court and for Federal Habeas Corpus procedures it has not been the primary legal issue. It wasn't and isn't necessary. You as a jurist of the Supreme Court have concurred on common law rulings that preclude the requirement of an ex post facto argument, per se, in

1

this case. In **STATE v. CORLISS, 1998 ME 36, 706 A.2d 593** you, as a jurist, concurred that prior convictions that have the effect of enhancing a sentence for a current offense are *elements of the crime.* At 595

> **"When the State charges a crime enhanced by <prior><convictions> of specified crimes, as it did in this case by charging Corliss with Class C OUI in violation of 29-A M.R.S.A. 2411, the <prior> <convictions> are an essential element of the crime charged. See Landry v. State, 575 A.2d 315, 316-17 (Me. 1990)"**

The U.S. Supreme Court in a series of cases has acknowledged that Maine and various other States have taken that position and leaves the issue to the State. The U.S. Supreme Court has acted only when a State's position on *element vs. enhancement factor* has significantly broadened the definition of *enhancement factor* to define away the constitutional requirement that every element of a crime be proven beyond a reasonable doubt. Most recently in **State v. Hodgkins , 2003 Me. 57** you, as a jurist, cited *Apprendi* v. New Jersey, 530 U.S. 466 (2000) which held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" re-affirming the fact of a prior conviction as an *element of the crime.*

Maine Superior Court Justice Hunter has stated in his rulings that the prior conviction is not an element of the crime but rather an enhancement factor – therefore he believes that M.R.S.A. 17-A Chapter 1 :

> **"When it is alleged that an element occurred "on or about" any date prior to the effective date of the code, the prosecution shall be governed by the prior law. When it is alleged that all of the elements occurred "on or about" the effective date of the code or any date thereafter, the prosecution shall be governed by the code."** (M.R.S.A. 17-A Chapter 1 further states that the same rule applies to new statutes outside of the code.)

does not apply to my case, that 29-A M.R.S.A. § 2411 (6) (B) does apply to my case, and that the prior conviction was properly plead and the case legally moved from District Court to Superior Court.

APPENDIX B

If the U.S. Constitution's requirement that every element of a crime be proven beyond a reasonable doubt has merit and your ruling in **STATE v. CORLISS, 1998 ME 36, 706 A.2d 593** has merit, and authority, than the issue is certainly "worthy of being fully heard". The U.S. Supreme Court considers it an extremely worthy issue and there is a good deal of controversy about it in recent cases.

2

Secondly, even if the prior conviction was an "enhancement factor" rather than an "element of the crime" and Justice Hunter, therefore, had not failed to inform me of every element of the crime for which I was being sentenced, the Maine Legislature has set a statute of limitations on prior convictions being used as "enhancements" per M.R.S.A. 17-A, PART 1, § 9-A. My prior conviction falls outside the ten year limitation and the enhanced C crime was illegal and the case was not within the jurisdiction of the Superior Court.

You were a concurring jurist in **State v. White, 2001 ME 65, ¶ 3, 769**

> **"Defendant may challenge his sentence as a matter of right if he has alleged a jurisdictional infirmity, and he may do so on direct appeal if that 'jurisdiction infirmity' appears on the record so plainly as to preclude rational disagreement as to its existence." *State v. Cunningham*, 1998 ME 167, ¶ 5, 715 A.2d 156 (quoting State v. Parker, 372 A.2d 570, 572 (Me. 1977)"**

It is my opinion and that of numerous other citizens of at least average intelligence that your rulings in the above cited cases more than sufficiently define a controversy that is worthy of a *full consideration* by the Maine Supreme

Judicial Court or more appropriately an order nullifying the sentence. Due process required that an appeal by right be allowed by the Law Court in accordance with above cited authorities, including yours as a jurist in those cases.

Nevertheless, I thank you for an expedient "ORDER" and hope the same will be true when in all probability I will need to file another request for a certificate of probable cause after the post conviction review is heard before Justice Hunter. It is unlikely that Justice Hunter will reverse his own rulings in the case, although I applaud him for granting a hearing. Time is a factor in my filing a federal habeas corpus action so perhaps an order could issue denying any future applications for certificates of probable cause in any way related to this case. That would fulfill the federal requirement for exhaustion of State remedies.

The United States is an incredible gift from God where ordinary citizens may openly and freely criticize their government officials without fear of reprisal. God Bless America.

Sincerely,

"_____"

Donald D. Chisholm, petitioner

Cc:Honorable Judge Hunter
Criminal Justice Committee, Maine State Legislature

MAINE SUPREME JUDICIAL COURT. Docket No.Lin-06-213
Sitting as the Law Court December 13, 2006

STATE OF MAINE	)	
Respondent	)	
	)	**ORDER DENYING**
v.	)	**CERTIFICATE OF**
	)	**OF PROBABLE CAUSE**
DONALD CHISHOLM	)	
Petitioner	)	

Panel: SAUFLEY, C.J., and CLIFFORD, DANA, ALEXANDER, CALKINS, LEVY, and SILVER, JJ.

PER CURIAM

Pursuant to 15 M.R.S.A. § 2131 and M.R. App. P. 19, the petitioner has sought review by the Law Court by filing a petition seeking a certificate of probable cause in this post-conviction review proceeding.

We have reviewed the judgment entered in the Superior Court, and have fully considered the petition and its request for a certificate of probable cause, as well as the accompanying memorandum. The petitioner contends that the Superior Court erred or exceeded its discretion in a variety of respects, including by its failure to find that his sentence *is* illegal because his manslaughter conviction occurred more than ten years prior to the OUI and, following his plea, the Legislature enacted 17-A M.R.S. § 9-A (2005), establishing a look-back period of ten years.

APPENDIX C

Based on our review, we determine that no further hearing or other action is necessary to a fair disposition of the matter.

It is therefore ORDERED that a certificate of probable cause to proceed with the appeal is hereby DENIED.

"RECEIVED

DEC 13 2006

Supreme Judicial Court"

APPENDIX C

CHAPTER 23
MAJOR OFFENSES-SUSPENSION AND REVOCATION (HEADING: PL 1993, c. 683, Pt. A, _2 (new); Pt. B, _5 (aff))
SUBCHAPTER I
GENERAL PROVISIONS (HEADING: PL 1993, c. 683, Pt. A, _2 (new); Pt. B, _5 (aff))

M.R.S.A. 29-A § 2411. Criminal OUI

1. Offense. A person commits OUI, which is a Class D **crime** unless otherwise provided, if that person operates a motor vehicle:

A. While under the influence of intoxicants; or [1993, c. 683, Pt. A, _2 (new); Pt. B, _5 (aff).]]

B. While having a blood-alcohol level of 0.08% or more. [1993, c. 683, Pt. A, _2 (new); Pt. B, _5 (aff).]

[1995, c. 368, Pt. AAA, _7 (amd).]

2. Pleading and proof. The alternatives outlined in subsection 1, paragraphs A and B may be pleaded in the alternative. The State is not required to elect between the alternatives prior to submission to the fact finder.

[1993, c. 683, Pt. A, _2 (new); Pt. B, _5 (aff).]

3. Investigation. After a person has been charged with OUI, the officer shall investigate whether the charged person has prior OUI offenses. As part of the investigation, the officer shall make necessary inquiries of the Secretary of State.

[1993, c. 683, Pt. A, _2 (new); Pt. B, _5 (aff).]

4. Arrest. A law enforcement officer may arrest, without a warrant, a person the officer has probable cause to believe has operated a motor vehicle while under the influence of intoxicants if the arrest occurs within a period following the

offense reasonably likely to result in the obtaining of probative evidence of blood-alcohol level or drug concentration.

[1993, c. 683, Pt. A, _2 (new); Pt. B, _5 (aff).]

5. Penalties. The following minimum penalties apply and may not be suspended:

A. For a person having no previous OUI offenses within a 10-year period:

(1) A fine of not less than $400, except that if the person failed to submit to a test, a fine of not less than $500;

(2) A court-ordered suspension of a driver's license for a period of 90 days; and

(3) A period of incarceration as follows:

(a) Not less than 48 hours when the person:

(i) Was tested as having a blood-alcohol level of 0.15% or more;

(ii) Was exceeding the speed limit by 30 miles per hour or more;

(iii) Eluded or attempted to elude an officer; or

(iv) Was operating with a passenger under 21 years of age; and

(b) Not less than 96 hours when the person failed to submit to a test at the request of a law enforcement officer;

[1997, c. 737, _8 (amd).]

B. For a person having one previous OUI offense within a 10-year period:

(1) A fine of not less than $600, except that if the person failed to submit to a test at the request of a law enforcement officer, a fine of not less than $800;

(2) A period of incarceration of not less than 7 days, except that if the person failed to submit to a test at the request of a law enforcement officer, a period of incarceration of not less than 12 days;

(3) A court-ordered suspension of a driver's license for a period of 18 months; and

(4) In accordance with section 2416, a court-ordered suspension of the person's right to register a motor vehicle; [1995, c. 368, Pt. AAA, _8 (rpr).]

C. For a person having 2 previous OUI offenses within a 10-year period:

(1) A fine of not less than $1,000, except that if the person failed to submit to a test at the request of a law enforcement officer, a fine of not less than $1,300;

(2) A period of incarceration of not less than 30 days, except that if the person failed to submit to a test at the request of a law enforcement officer, a period of incarceration of not less than 40 days;

(3) A court-ordered suspension of a driver's license for a period of 4 years; and

(4) In accordance with section 2416, a court-ordered suspension of the person's

right to register a motor vehicle; [1995, c. 368, Pt. AAA, _8 (rpr).]

D. For a person having 3 or more previous OUI offenses within a 10-year period, which is a Class C crime:

(1) A fine of not less than $2,000, except that if the person failed to submit to a test at the request of a law enforcement officer, a fine of not less than $2,400;

(2) A period of incarceration of not less than 6 months, except that if the person failed to submit to a test at the request of a law enforcement officer, a period of incarceration of not less than 6 months and 20 days;

(3) A court-ordered suspension of a driver's license for a period of 6 years; and

(4) In accordance with section 2416, a court-ordered suspension of the person's right to register a motor vehicle; [1995, c. 645, Pt. B, _18 (amd).]

E. If a law enforcement officer failed to provide the warnings required by section 2521, subsection 3, the increase in minimum penalties required because of a refusal to submit to a test is not mandatory; [1997, c. 737, _9 (amd).]

F. For a person sentenced under paragraph B, C or D, the court shall order the defendant to participate in the alcohol and drug program for multiple offenders. The court may waive the multiple offender intervention program under

Title 5, section 20073, subsections 4 and 5, if the court finds that the defendant has completed a residential alcohol or drug treatment program, or its equivalent, subsequent to the date of the offense; and [1997, c. 737, _10 (amd).]

G. The court shall order an additional period of license suspension of 275 days for a person sentenced under paragraph A, B, C or D if the person was operating the motor vehicle at the time of the offense with a passenger under 21 years of age. [1997, c. 737, _11 (new).]

[1997, c. 727, __8 - 11 (amd).]

5-A. Notice and custody. The court shall give notice of a license suspension and shall take physical custody of the driver's license.

[1995, c. 368, Pt. AAA, _9 (new).]

5-B. Additional period of suspension. The Secretary of State may impose an additional period of suspension under section 2451, subsection 3 or may extend a period of suspension until satisfaction of any conditions imposed pursuant to chapter 23, subchapter III, article 4.

[1995, c. 368, Pt. AAA, _9 (new).]

6. Aggravated punishment category. An operator commits a Class C offense if the State pleads and proves that the operator, while operating a motor vehicle in violation of this section:

B. Has either a prior conviction for a Class C crime under this section or a prior criminal homicide conviction involving or resulting from the operation of a motor vehicle while under the

influence of intoxicating liquor or drugs or with a blood-alcohol content of 0.08% or greater.

[1999, c. 703, _1 (new).]

The sentence must include a period of incarceration of not less than 6 months, a fine of not less than $2,000 and a court-ordered suspension of a driver's license for a period of 6 years. These penalties may not be suspended.

APPENDIX D

CHAPTER 305-A

POST-CONVICTION REVIEW

15 § 2121. Definitions

As used in this chapter, the following terms have the following meanings. [1979, c. 701, §15 (new).]

1. Criminal judgment. "Criminal judgment" means a judgment of conviction of a crime, the orders of adjudication and disposition in a juvenile case and a judgment of not criminally responsible by reason of mental disease or defect.

[1995, c. 286, §2 (amd).]

1-A. Assigned justice. "Assigned justice" means the Justice or Active Retired Justice of the Supreme Judicial Court or the Justice or Active Retired Justice of the Superior Court assigned the post-conviction review proceeding when a special assignment has been made. It means any Justice or Active Retired Justice attending to the regular criminal calendar when the post-conviction review proceeding is assigned to the regular criminal calendar.

[1985, c. 209, §1 (new).]

2. Post-sentencing proceeding. "Post-sentencing proceeding" means a court proceeding or administrative action occurring during the course of and pursuant to the operation of a sentence that affects whether there is incarceration or its length, including revocation of parole, failure to grant parole, an error of law in the computation of a sentence and default in payment of a fine or restitution. It does not include administrative disciplinary proceedings resulting in a withdrawal of good-time deductions, revocation of probation, cancellation of supervised community confinement or

aftercare status of a juvenile or proceedings before the Appellate Division of the Supreme Judicial Court.

[1997, c. 464, §1 (amd).]

3. Sentence. "Sentence" means the punishment imposed in a criminal proceeding or the disposition imposed in a juvenile proceeding.

[1983, c. 235, §2 (rpr).]

Section History:
1979, c. 701, § 15 (NEW).
1985, c. 209, § 1 (AMD).
1995, c. 286, § 2 (AMD).
1981, c. 238, § 1 (AMD).
1983, c. 235, § 1,2 (AMD).
1985, c. 556, § 1 (AMD).
1997, c. 464, § 1 (AMD).

15 § 2122. Purpose

APPENDIX E

This chapter provides a comprehensive and, except for direct appeals from a criminal judgment, the exclusive method of review of those criminal judgments and of post-sentencing proceedings occurring during the course of sentences. It is a remedy for illegal restraint and other impediments specified in section 2124 that have occurred directly or indirectly as a result of an illegal criminal judgment or post-sentencing proceeding. It replaces the remedies available pursuant to post-conviction habeas corpus, to the extent that review of a criminal conviction or proceedings are reviewable, the remedies available pursuant to common law habeas corpus, including habeas corpus as recognized in Title 14, sections 5501 and 5509 to 5546, coram nobis, writ of error, declaratory judgment and any other previous common law or statutory method of review, except appeal of a judgment of conviction or juvenile adjudication and remedies that are incidental to proceedings in the trial court. The substantive extent of the remedy of post-conviction review is defined in this chapter and not defined in the remedies that it replaces; provided that this chapter provides and is construed to provide relief for those persons required to use this chapter as required by the Constitution of Maine, Article 1, Section 10. [1997, c. 399, '1 (amd).]

Section History:
1997, c. 399, § 1 (AMD).
1979, c. 701, § 15 (NEW).

15 § 2123. Jurisdiction and venue

1. Jurisdiction. Jurisdiction shall be in the Superior Court. [1979, c. 701, § 15 (new).]

APPENDIX E

1-A. Supreme Court Justice. A single Justice of the Supreme Judicial Court or an Active Retired Justice of the Supreme Judicial Court shall have and exercise jurisdiction, and have and exercise all of the powers, duties and authority necessary for exercising the same jurisdiction as the Superior Court relative to a post-conviction review proceeding. [1985, c. 209, § 2 (new).]

2. Venue. Venue shall be in the county in which the criminal judgment was entered. Venue may be transferred by the assigned justice at his discretion. [1983, c. 816, Pt. B, § 4 (amd).]

Section History:
1983, c. 235, § 3 (AMD).
1983, c. 816, § B4 (AMD).
1985, c. 209, § 2 (AMD).
1979, c. 701, § 15 (NEW).

APPENDIX E

15 § 2124. Jurisdictional prerequisite of restraint or impediment

An action for post-conviction review of a criminal judgment of this State or of a post-sentencing proceeding following the criminal judgment may be brought if the person seeking relief demonstrates that the challenged criminal judgment or post-sentencing proceeding is causing a present restraint or other specified impediment as described in subsections 1 to 3: [1997, c. 399, §2 (amd).]

1. Present restraint by criminal judgment. Present restraint or impediment as a direct result of the challenged criminal judgment:

A. Incarceration pursuant to the sentence imposed as a result of the criminal judgment which is challenged; [1979, c. 701, §15 (new).]

B. Other restraint, including probation, parole, other conditional release or a juvenile disposition other than incarceration or probation, imposed as a result of the sentence for the criminal judgment which is challenged; [1983, c. 235, §5 (amd).]

C. A sentence of unconditional discharge resulting from a criminal judgment, for a period of 2 years following the date of sentence; [1979, c. 701, §15 (new).]

D. Incarceration, other restraint or an impediment specified in paragraphs A, B and C which is to be served in the future, although the convicted or adjudicated person is not in execution of the sentence either because of release on bail pending appeal of the criminal

judgment or because another sentence must be served first; or [1983, c. 235, §5 (amd).]

E. A fine imposed by the challenged criminal judgment which has not been paid; [1979, c. 701, §15 (new).]

[1983, c. 235, §5 (amd).]

1-A. Present or future restraint by commitment to the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services. Present restraint or impediment as a direct result of commitment to the custody of the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services pursuant to section 103 imposed as a result of being found not criminally responsible by reason of mental disease or defect, that is challenged, or future restraint or impediment as a result of such an order of commitment that is challenged when a sentence involving imprisonment is or will be served first.

A claim for postconviction review is not allowed under this subsection relative to any court proceeding or administrative action that affects release or discharge pursuant to section 104-A;

[RR 1995, c. 2, §32 (cor).]

APPENDIX E

2. Post-sentencing proceeding. Incarceration or increased incarceration imposed pursuant to a post-sentencing proceeding following a criminal judgment, although the criminal judgment itself is not challenged; or

[1979, c. 701, §15 (new).]

3. Present indirect impediment. Present restraint or impediment resulting indirectly from the challenged criminal judgment of this State:

A. Incarceration imposed in this State, in another state or in a Federal Court pursuant to a sentence for a subsequent criminal judgment for a crime punishable by incarceration for a year or more, the length of the incarceration being greater than it would otherwise have been in the absence of the challenged criminal judgment of this State. The criminal judgment which is challenged must be for a crime punishable by incarceration for a year or more. This requirement is not satisfied by a showing only that the court imposing the present sentence was aware of the challenged criminal judgment or if it appears from the length or seriousness of the person's total criminal record that the challenged criminal judgment, taking into account its seriousness and date, could have little or no effect on the length of incarceration under the subsequent sentence; [1985, c. 209, §3 (amd).]

B. A pending trial or incarceration pursuant to a sentence following a criminal judgment in this State, in another state or in a Federal Court for a crime, the degree of which or the potential penalty of which is increased as a result of the

challenged criminal judgment of this State. This requirement is not satisfied unless:

(1) The subsequent crime, as enhanced, is, in the case of a crime in this State, punishable by incarceration of one year or more or, in the case of a crime in another jurisdiction, is a felony or an infamous crime; and

(2) If a sentence for the subsequent crime has been imposed, the length of that sentence actually exceeds the amount of incarceration which could have been imposed for the subsequent crime had its potential penalty not been enhanced by the challenged criminal judgment; or [1979, c. 701, §15 (new).]

C. A pending trial or any of the restraints or impediments specified in subsection 1 following a criminal judgment in this State, another state or in a Federal Court for a crime for which proof of the criminal judgment of this State that is challenged constitutes an element of the subsequent crime. [1979, c. 701, §15 (new).]

[1985, c. 209, §3 (amd).]

Section History:
1985, c. 209, § 3 (AMD).

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1995, RR c. 2, § 32 (COR).
1979, c. 701, § 15 (NEW).
1983, c. 235, § 4,5 (AMD).
1995, c. 286, § 3 (AMD).
1997, c. 399, § 2 (AMD).

15 § 2125. Ground for relief

A person who satisfies the prerequisites of section 2124 may show that the challenged criminal judgment or sentence is unlawful or unlawfully imposed, or that the impediment resulting from the challenged post-sentencing procedure is unlawful, as a result of any error or ground for relief, whether or not of record, unless the error is harmless or unless relief is unavailable for a reason provided in section 2126 or 2128. [1981, c. 238, ' 2 (amd).]

Section History:
1979, c. 701, § 15 (NEW).
1981, c. 238, § 2 (AMD).

15 § 2126. Exhaustion

A person under restraint or impediment specified in section 2124 must also demonstrate that he has previously exhausted remedies incidental to proceedings in the trial court, on appeal or administrative remedies. A person who has taken an appeal from a judgment of conviction or a juvenile adjudication is not precluded from utilizing the remedy of this chapter while the appeal is pending, provided that the post-conviction review proceeding is automatically stayed pending resolution of the appeal unless the Appellate Court on motion and for good cause otherwise directs. [1985, c. 556, ' 2 (amd).]

Section History:

APPENDIX E

1985, c. 556, § 2 (AMD).
1979, c. 701, § 15 (NEW).
1981, c. 238, § 3 (AMD).

APPENDIX E

Donald D. Chisholm
P.O. Box 120
Vinalhaven, Me. 04863

January 29, 2002

Honorable E. Allen Hunter
Justice Of the Maine Superior Court
P.O. Box 249
Wiscasset, Me. 04578

Re: State v. Chisholm, No. WISSC.CR-2001 -048

Dear Judge Hunter:

Please find copy of letter from the Public Defender, Daniel Purdy, to you dated January 6, 2002.

As of that time this case was intended for trial and a Motion to Dismiss was pending. As I stated to you at the hearing in accordance with M.R. Crim. P. 11A on January 16, 2002, the police report was highly inaccurate. Despite that, I did not contest the report on advice from Attorney Purdy.

Attorney Purdy also advised me that "Defendant', Donald D. Chisholm's Motion for Dismissal of Complaint for Operating Under Influence, Class C Title 29-A M.R.S.A. Sec. 2411(1) Docket No. CR-2001 -00086" which I filed Pro Se back in March of 2001 had no merit and would not be pursued because Maine Law does not consider a prior conviction to be an "element of the crime". This week I researched the issue as to whether Maine considers a prior offense an "element of the crime" when contained in the statute describing a crime and discovered that Attorney Purdy was completely wrong. I have included one recent

case. LANDRY v STATE, 1990 ME, 575 A.2d 315.

Maine Law does consider a prior conviction an "element". My Motion to Dismiss had merit and was never ruled on by the Superior Court for nine months prior to the M.R. Crim. P. 11A hearing.

The plea agreement did not include a contingency that the Motion to Dismiss be preserved for review by the Law Court. I will nevertheless file for permission to have the issues contained in the motion reviewed.

I find it hard to believe that an Attorney, Court Appointed or otherwise would advise a client-that a prior conviction when joined with a current offense is not considered an element of the crime. I find it hard to believe that a defendant can file a Motion to Dismiss in a timely manner and have no ruling for nine months. I understand that you were not sitting in Lincoln County during those 9 months and the motion never came before you.

This is very upsetting.

Yours Truly,

"_____"

Donald D. Chisholm

"1/30/2002
Receipt of letter noted. No Action required in response. Any further request for relief can be addressed in due course by presiding Justice.
E. Allen Hunter"

APPENDIX F

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STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court — Docket No. Lin-03-466

DONALD D. CHISHOLM	)	
Petitioner	)	
v.	)	ORDER DENYING
	)	CERTIFICATE OF
STATE OF MAINE	)	PROBABLE CAUSE
Respondent	)	

Pursuant to M.R. Crim. P. *35(f)* and M.R. App. 19(a), the petitioner has filed a notice of appeal from an order of the Superior Court in the above-entitled proceeding denying a motion for correction or reduction of sentence, which notice by law constitutes a request for a certificate of probable cause.

Upon consideration of the proceedings in the Superior Court and any memorandum filed by the petitioner in support of his request for a certificate of probable cause, it is apparent that the appeal does not raise any issue worthy of being fully heard.

Petitioner alleges his sentence of three years for operating under the influence (OUI) Class C is illegal, and that 29-A M.R.S.A. § 241 1(6)(B), elevating an OUI conviction to a Class C offense based on a prior conviction, is an unlawful ex post facto law.

It is ORDERED that a certificate of probable cause to proceed with the appeal be and hereby is denied. It is FURTHER ORDERED that a copy of this order, together

with the proceedings in the Superior Court now on file in this Court, be returned to the clerk of the Superior Court.

Dated:
"September 15, 2003

For the Court,

_____
Robert W. Clifford
Associate Justice"

"RECEIVED
Sep 16 2003
Supreme Judicial Court"

APPENDIX H

STATE OF MAINE Cumberland, ss.	SUPERIOR COURT Criminal Action Docket No. _____ Docket No. CR-87-1955
* * * * * * * * * * *	
DONALD D. CHISHOLM *	
Petitioner *	PETITION FOR POST
v. *	CONVICTION
*	REVIEW M.R.S.A.
STATE OF MAINE *	CHAPTER 305
Respondent *	-A 3, B2
* * * * * * * * * * *	

STATEMENT OF JURISDICTION AND PROCEDURAL HISTORY

Subject matter jurisdiction originally existed in the Cumberland County Superior Court of the State of Maine. In the years of 1987 and 1988 Petitioner, Donald Chisholm, was indicted, tried, and then convicted of a two count violation of 17-A M.R.S.A. Section 203(3)(Manslaughter) and 29 M.R.S.A. Section 1312-B (OUI/EBA) before Justice Paul Fritzsche in a jury-waived trial in Cumberland County Superior Court. He was sentenced on Count I to an eight year term of imprisonment in the custody of the Department of Corrections, with all but six years suspended, followed by a four year period of probation, and on Count II to a concurrent 364 day term of imprisonment.

Petitioner Chisholm filed a timely notice of appeal to the Maine Supreme Judicial Court sitting as the Law Court pursuant to 15 M.R.S.A. §2115 (Supp. 1988) and M.R.Crim.P. 37 from his criminal judgments in CR-87-1955.

APPENDIX I

The docket number assigned by the Law Court to the direct appeal was CUM-89-48. The Maine Law Court issued a written decision dated October 18, 1989, found no reversible error and affirmed the judgment. State of Maine v. Chisholm, 565 A.2d 92 (Me. 1989).

On November 10, 2000 Donald Chisholm was arrested and charged with operating a motor vehicle on a public way or parking area when his license had been suspended, 29-A M.R.S.A. 2412-A(1)(E)Class E, and operating while under the influence of intoxicating liquor, in violation of 29 M.R.S.A. §2411 (1)(A),(5)(A)(3)(b), Class D. Defendant Chisholm was arraigned on the charges on January 17, 2001 (Docket No. CR-2000-01207) at the Lincoln County Courthouse in Wiscasset. Judge John Atwood entered not guilty pleas on Chisholm's behalf. On March 21, 2001 a second arraignment was conducted based upon the same November 10, 2000 incident. The Class D Operating Under the Influence charge was in the process of being dismissed by the State and a Class C charge was being initiated in accordance with Title 29-A M.R.S.A. SEC. 2411 (6) effective on August 11, 2000. This complaint was docketed as "WISDC-CR-2001-00086". Chisholm was arraigned for a third time on the same incident on June 14, 2001 when the Lincoln County grand jury handed down an indictment based on subsection (6) of Title 29-A M.R.S.A. SEC. 2411 (6) (new Docket No. CR-01-048).
Subsection (6) reads as follows:

> "**A6. Aggravated punishment category**. An operator commits a Class C offense if the State pleads and proves that the operator, while operating a motor vehicle in violation of this section:

> A. In fact caused serious bodily injury as defined in Title 17-A, section 2, subsection 23 to another person or in fact caused the death of another person; or [1999, c. 703, '1 (new).]
>
> B. Has either a prior conviction for a Class C crime under this section or a prior criminal homicide conviction involving or resulting from the operation of a motor vehicle while under the influence of intoxicating liquor or drugs or with a blood-alcohol content of 0.08% or greater. [1999, c. 703, '1 (new).]
>
> The sentence must include a period of incarceration of not less than 6 months, a fine of not less than $2,000 and a court-ordered suspension of a driver's license for a period of 6 years. These penalties may not be suspended. [1999, c. 703, §1 (rpr).] "

This Class C subsection, effective August 11, 2000, significantly changed the legal consequences of Chisholm's 1988 conviction for violation of 17-A M.R.S.A. Section 203 (3) (Manslaughter). In removing all statute of limitation protections provided in Title 29A § 2411 for OUI offenses the new subsection causes Chisholm's current November 10, 2000 incident for OUI to increase from a Class D misdemeanor, first time offense, to a Class C offense. Although Mr. Chisholm's prior conviction occurred twelve years before the current charge, the new subsection enhances the Class D violation to a Class C violation when the State "pleads and proves" the prior conviction. With an indefinite, retroactive application of the new statute any person having

been convicted of a violation of 17-A M.R.S.A. Section 203(3)(Manslaughter) at any time in their past had immediately fulfilled one element of a Class C violation when the new subsection took effect on August 11, 2000. Mr. Chisholm fulfilled the second element of the alleged violation when he was charged with the current OUI on November 11, 2000. Instead of facing the pre-enactment penalties of 48 hours in jail, a ninety day license suspension and a fine of less than $800, the maximum penalties became 5 years in jail, a six-year license suspension and a $5000 fine. Chisholm pled guilty through a Rule 11 Plea Hearing on January 16, 2002. At that hearing Chisholm specifically stated that in pleading guilty he was not admitting guilt to the prior conviction (enhancement factor) and that he reserved the right to challenge that conviction through a post conviction review in accordance with M.R.S.A. CHAPTER 305-A 3, B(2).

PROCEDURAL AUTHORITY FOR POST CONVICTION REVIEW

Mr. Chisholm now challenges the legality of the "prior criminal homicide conviction involving or resulting from the operation of a motor vehicle while under the influence of intoxicating liquor" element of this new subsection (6) offense and seeks to do so through M.R.S.A. Title 15 Chapter 305-A. This statute requires certain prerequisites for post conviction actions.

> **15 § 2124. Jurisdictional prerequisite of restraint or impediment**
>
> An action for post-conviction review of a criminal judgment of, this State or of a post-

sentencing proceeding following the criminal judgment may be brought if the person seeking relief demonstrates that the challenged criminal judgment or post-sentencing proceeding is causing a present restraint or other specified impediment as described in subsections 1 to 3: [1997, c. 399, '2 (amd).]

1. Present restraint by criminal judgment. Present restraint or impediment as a direct result of the challenged criminal judgment:

A. Incarceration pursuant to the sentence imposed as a result of the criminal judgment which is challenged; [1979, c. 701, §15 (new).]

B. Other restraint, including probation, parole, other conditional release or a juvenile disposition other than incarceration or probation, imposed as a result of the sentence for the criminal judgment which is challenged; [1983, c. 235, § 5 (amd).]

As a result of CR-01-048, Mr. Chisholm was sentenced to 3 years (all suspended except 10 months), is currently serving probation of 14 months, owes approximately $2800.00 in fines and is serving a license suspension of 6 years. This sentence is well beyond the maximum sentence that could have been imposed absent the prior conviction element, CR-87-1955. M.R.S.A. Title 15 Chapter 305-A provides for filing a post conviction review based on the merits of any challenges to the prior conviction element.

APPENDIX I

GROUNDS FOR RELIEF

In 1987 Donald D. Chisholm plead not guilty to the 17-A M.R.S.A. Section 203(3)(Manslaughter) charge. A jury waved trial was conducted in September of 1988. Justice Paul Fritzsche found Defendant Chisholm guilty "beyond a reasonable doubt" of the charge.[1]

A wrongful death suit, Docket No. CV-89-1271, was subsequently brought against Chisholm by Stephen Beale, the son of Robert Beale, who was killed in the automobile collision. The trial of CV-89-1271 produced a finding of fact[2] which Chisholm believes significantly challenges the finding of fact from CR-87-1955. In the current petition Chisholm presents the finding of fact from CV-89-1271 as new evidence that a guilty beyond a reasonable doubt standard had not been met in CR-87-1955. As a jury found in CV-89-1271 that Robert Beale was negligent and a proximate cause of the accident this petition claims that the standard for manslaughter provided in 17-A M.R.S.A. § 33 was not met.

> 17-A § 33. Result as an element; causation
>
> Unless otherwise provided, when causing a result is an element of a crime, causation may be found where the result would not have occurred but for the conduct of

---

[1] Finding of Fact, Justice Paul Fritzsche, CR-87-1955, TT. 501-529, Appendix A ...this document.

[2] See "Special Verdict Form", CV-89-1271, Appendix Item B...this document.

> the defendant operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the defendant was clearly insufficient .[198,c.324,'14(new).]

Justice Paul Fritzsche qualified what fact had to be proved beyond a reasonable doubt in order to reach a guilty verdict. He stated at page 515 of the trial transcripts that:

> 15....If the state is unable to prove, by
> 16 proof beyond a reasonable doubt, that Mr. Chisholm
> 17 crossed the centerline and hit Mr. Beal's vehicle,
> 18 the state cannot prove that fact, I don't think
> 19 that there can be a conviction.

Justice Fritzsche went on in the finding of fact to review his interpretation of the evidence and why he interpreted the evidence to indicate that Chisholm had crossed the centerline into the wrong lane of travel impacting Robert Beale's car and causing Robert Beale's death.[3] At sentencing Justice Fritzsche stated:

---

[3] Chisholm has argued (CUM-94-919 and CUM-92-239) to the Maine Supreme Judicial Court that Justice Fritzsche's conclusions constitute at best surmise and conjecture and that the expert testimony on which he based his opinions was inadmissable per Parker v. Hohman, Me.250 A.2nd 698 (1969). The LAW COURT has never directly referenced the

"We have a person who was clearly innocent, clearly minding his own business and was wrongfully and tragically killed."[4]

The wrongful death suit, CV-89-1271, was filed on or about December 10 of 1989. The Plaintiff's pleadings described Mr. Chisholm's negligence in the same approximate manner as had been done by Justice Fritzsche[5]. Chisholm's pleadings[6] did not back down from his original statement to the police at the scene of the accident on October 3, 1987. Chisholm's affirmative defense to the suit was a denial of legitimacy of the criminal finding and the associated claims of negligence. (See averment 4., 5). At the trial of CV-89-1271 in 1994 the Plaintiff offerred evidence that the accident reconstruction report of the Portland Police Department represented the truth as to what happened and Chisholm offered the specific defense of his eyewitness account and the testimony of expert witness Alfred Moseley as evidence that it did not. One position holds that Mr. Chisholm crossed the centerline into the wrong lane and the other position holds Robert Beale crossed the centerline into the wrong lane. The jury found that Robert Beale was negligent and a proximate cause of the accident. The jury

---

common law or addressed the issue. See Appendix Item C....this document ..Parker argument from CUM-92-239.

[4] Sentencing transcripts are published. I could not find my copies to include here.

[5] Justice Fritzsche adopted police report as fact. See police report Appendix Item D.

[6] See pleadings averments 4 and 5 , Appendix Item E.

APPENDIX I

further found that Chisholm was negligent and that his negligence was greater than that of Robert Beale.

Chisholm intends to call jury members from CV-89-1271 to determine first hand exactly what they found to be true. If the jury found that Robert Beale crossed the centerline into the oncoming truck driven by Mr. Chisholm, then as Justice Fritzsche previously stated, supra.," I don't think that there can be a conviction." That thought would be consistent with 17-A M.R.S.A. § 33, " Unless otherwise provided, when causing a result is an element of a crime, causation may be found where the result would not have occurred but for the conduct of the defendant operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the defendant was clearly insufficient. [198, c.324,'14(new).]" If the jury found that Robert Beale was "negligent and a proximate cause of the accident" because he crossed the centerline into the wrong lane of travel and Mr. Chisholm was more negligent because of a high blood alcohol level than Mr. Chisholm's behavior was clearly insufficient to cause the result of Robert Beale's death. A driver crossing the centerline into oncoming traffic is clearly sufficient to cause a death and therefore in this case Mr. Chisholm's conviction for manslaughter should be reversed.[7]

(The grounds for this petition have not previously been considered by the Superior Court in the form of a post conviction review or by the Federal Court in form of habeas corpus.)

---

[7] A an issue may be "actually" decided even if it is not explicitly decided, for it may have constituted, logically or practically, a necessary component of the decision reached. Dennis v. Rhode Island Hospital Trust National Bank, 744 F. 2d 893 (1st Cir.)

APPENDIX I

WHEREFORE, Petitioner Donald D. Chisholm, prays that the Court will schedule a hearing to allow the petitioner to further present his arguments as to why the conviction in CR-87-1955 should be reversed and to present further evidence in that regard.

Executed at Rockland, Maine in the County of Knox this day January"13", 2003 by:

" _____ "

Donald D. Chisholm
P.O. Box 532
Rockland, Me. 04841

Verification to Petition

I, Donald D. Chisholm , being first duly sworn, deposes and says:

I am the petitioner named in the foregoing petition; I wrote the same; that all matters set forth therein are true to the best of my personal information and belief and I believe them to be true.

" _____ "

Donald D. Chisholm

Subscribed and sworn to before me this 13th day of January, 2003.

" _____ "

Notary Public

APPENDIX I

STATE OF MAINE
CUMBERLAND,ss.

SUPERIOR COURT
CIVIL ACTION
Docket No.:CV-89-1271

STEPHEN E. BEALE,)
Plaintiff)
vs.) **SPECIAL VERDICT FORM**
)
DONALD D. CHISHOLM)
Defendant)

"STATE OF MAINE
Cumberland, ss,
Clerk's Ofice
SUPERIOR COURT
NOV 4 1994
RECEIVED"

1. Was Robert Beale negligent and was his negligence a proximate cause of the accident?

Yes x no _____

If the answer to question No. 1 is "no", answer no more questions. If the answer to question No. 1 is "yes" please go on.

2. Was Robert Beale's negligence equal to that of Donald Chisholm?

Yes___ no x

3. Was Robert Beale's negligence greater than the negligence of Donald Chisholm?

Yes___ no x

Dated this ___day of November in Portland, Maine.

"Mark A. Violette"
Foreperson

"A TRUE COPY

Number of jurors concurring "8 "
Number of jurors not concurring "0 "

LucilleJ. Lepitre
ATTEST CLERK"

APPENDIX I

Further amend the bill by striking out all of section 1 and inserting in its place the following:

'Sec. 1. 29-A MRSA § 2411, sub-§6, as amended by PL 1995, c. 368, Pt. AAA, §10, is repealed and the following enacted in its place:

6. Aggravated punishment category. An operator commits a Class C offense if the State pleads and proves that the operator, while operating a motor vehicle in violation of this section:

A. In fact caused serious bodily injury as defined in Title 17-A, section 2, subsection 23 to another person or in fact caused the death of another person; or

B. Has either a prior conviction for a Class C crime under this section or a prior criminal homicide conviction involving or resulting from the operation of a motor vehicle while under the influence of intoxicating liquor or drugs or with a blood-alcohol content of 0.08% or greater.

The sentence must include a period of incarceration of not less than 6 months, a fine of not less than $2,000 and a court-

ordered suspension of a driver's license for a period of 6 years. These penalties may not be suspended.'

Further amend the bill by inserting at the end before the summary the following:

'FISCAL NOTE

This bill increases the penalty for certain crimes from Class D to Class C crimes, resulting in a shift of costs from the counties to the State. Sentences of more than 9 months for Class C crimes must be served in state correctional institutions at the cost of $67,311 per sentence based on an average length of stay of 2 years and 5 months. Sentences of 9 months or less for a Class C crime and all sentences for a Class D crime must be served in county jails.

The Judicial Department may require additional General Fund appropriations to cover indigent defense costs related to these new cases. The amounts can not be estimated at this time. The additional workload and administrative costs associated with the minimal number of new cases filed in the court system can be absorbed within the budgeted resources of the Judicial Department. The collection of additional fines may also

increase General Fund revenue by minor amounts.'

SUMMARY

This amendment replaces the title and replaces the bill. The amendment makes it a Class C crime to operate a motor vehicle under the influence of intoxicating liquor or drugs if a person has a prior conviction for a Class C crime under the aggravated punishment category of criminal OUI or if the person has a prior criminal homicide conviction involving or resulting from the operation of a motor vehicle while under the influence of intoxicating liquor or drugs or with a blood alcohol content of 0.08% or more.

The amendment also adds a fiscal note.

STATE OF MAINE

District Court	Docket No.
Wiscasset	WISDC-CR-2001-00086

STATE OF MAINE)
Plaintiff) **Defendant, Donald**
) **D. Chisholm's**
) **Motion for Dismissal of**
) **Complaint for Operating**
) **Under Influence, Class C**
DONALD D. CHISHOLM) **Title 29-A M.R.S.A.Sec.2411**
Defendant) **(1)Docket No. CR-2001-00086**
)

AND NOW COMES the Defendant, Donald D. Chisholm, acting pro se, in above captioned action, and moves this Honorable Court to dismiss this Operating Under the Influence Charge with prejudice for good cause shown.

This motion is filed in accordance with the Maine Rules of Criminal Procedure, Rule 12 (a)and (b)(1)(2)(3)(4)(5). Rule 12(b) indicates that the motion to dismiss would be filed before trial, 12(b)3 indicates the motion would be filed within 21 days after the entry of a plea and 12(b)5 indicates that the motion may be filed without entering a plea. The Defendant hereby files the motion to dismiss on the day of arraignment in District Court and prays that the court will hear the motion at that time or schedule a bind over hearing according to M.R.Crim.P 5A.

APPENDIX K

PROCEDURAL HISTORY

On November 10, 2000 at approximately 3:45 A.M. the current Defendant, Donald D. Chisholm, was taken into custody by a Lincoln County Deputy Sheriff Michael Elwell and charged with violations under 29-A Sec 2411 Operating Under the Influence and 29 Sec. 2412-A Operating After Suspension.[1] The suspension of license that was in effect at the time of this arrest has since been deleted from the Defendant's record.[2]

At approximately 11:00 A.M of the same morning the Defendant was released from direct custody on unsecured bail in the amount of $500.00.

On January 17th 2001 the Defendant appeared in open court at the Lincoln County District Court in Wiscasset for arraignment. The COMPLAINT[3] was read in open court directly to the Defendant. As the transcripts of the arraignment have recorded, the Defendant asked the Judge to clarify the charges that were being brought by the State of Maine in the Operating Under the Influence Count of the COMPLAINT, Docket No. 2000-01207, supra. The Judge indicated that the charge was a Class D, misdemeanor first offense with the associated minimum penalties. The Judge then requested that the Attorney for the State and the Defendant, Donald D. Chisholm discuss a plea agreement and present the plea agreement to the court during that day's session. Upon recalling the case for hearing the Judge learned

---

[1] See Appendix Item #1._UNIFORM SUMMONS AND COMPLAINT_ 352720, 352721

[2] See Appendix Item #2 Secretary of State's notice of deletion from record.

[3] See Appendix Item #3 COMPLAINT.

that the Attorney for the State had refused to discuss a plea agreement with the Defendant. The Judge then on his own prerogative entered not guilty pleas on both Counts of the Complaint on behalf of the Defendant.

On or about January 22, 2001 the Defendant received through the mail discovery materials from the Attorney for the State[4] in reference to this case, CR-2000-01207. The cover letter contained the "STATE'S REQUEST FOR DISCOVERY". On or about January 29th, 2001 the Defendant mailed discovery material[5] to the Attorney for the State.

On or about the 13th of February, 2001 a law enforcement officer for the County of Washington, Maine served the Defendant, Donald D. Chisholm, a "SUMMONS (for Arraignment) M.R. Crim. P. 4 (b))"[6]. That summons described an action docketed as "WISDC-CR-2001-00086". Uncertain as to why he was being summonsed again in the operating under the influence incident, the Defendant placed a call to the clerk of courts for Maine District Court in Wiscasset. The clerk informed the current Defendant that the Attorney for the State had dismissed both counts of the action CR-2000-01207 and had filed a "new complaint" charging a "Class C Felony". As of the date of this current document the Defendant has received no official notice that the charges under CR-2000-01207 have been "dismissed".

On or about February 21, 2001 the Defendant filed a Motion for Court Appointed Assistance of Counsel in accordance with M.R.S.A. Title 15 § 810, not knowing if the

---

[4] See Appendix Item #4, cover letter from discovery materials.

[5] See Appendix Iem #5, cover letter from return discovery materials.

[6] See Appendix Item #6, document

Complaint under Docket No.WISDC-CR-2001-00086 had been born from indictment or otherwise. The SUMMONS ordered the Defendant to appear for a "HEARING-ARRAIGNMENT". In the case of a hearing it seems that the Defendant should have assistance of counsel. As of March 4, 2001 the Defendant had received no ruling on the motion, although the statute states that "Before arraignment, competent defense counsel shall be assigned by the Superior or District Court.".

As the Maine Rules of Criminal Procedure, Rule 12 gives only "21 days after the entry of a plea unless the court specifies a different time" to file motions to dismiss, the Defendant hereby files this motion to dismiss, pro se, to protect and preserve his rights.

ARGUMENT

1. THE CHARGES IN CR-2001-00086 DO NOT QUALIFY AS ADDITIONAL CHARGES ARISING FROM THE ORIGINAL INCIDENT OR COURSE OF CONDUCT AS DEFINED IN MAINE RULES OF CRIMINAL PROCEDURE RULE 3(A) AND THEREFORE THE STATE IS PROHIBITED FROM COMMENCING THE CHARGES UNDER A NEW DOCKET NUMBER OR OTHERWISE.

The Maine Rules of Criminal Procedure, Rule 3(a) states:

> "Nothing in this rule shall prohibit the later commencement of additional charges arising from the original incident or course of conduct"

APPENDIX K

What charge in CR-2001-00086 is "additional" with respect to the original action CR-2000-01207 arising from the original incident 00110279? No charge is additional. What is "additional" is that the State is now alleging the essential element necessary to elevate the statutory class of the principal offense, the prior criminal homicide conviction. This prior conviction is not an "additional charge" to be commenced in a new complaint but rather is an additional element now being plead as contained in the charging statute M.R.S.A. 29-A § 2411. The State knows, or should know that "if a charge otherwise within the trial jurisdiction of the District Court is enhanced to a Class C crime or above, the complaint shall allege the prior convictions to charge the enhanced crime." M.R.Crim. P. 3(b).

> 17-A § 9- ALLEGATION of prior conviction when sentence enhanced
>
> **1.** Except as otherwise provided by law, a prior conviction must be specially alleged if the sentencing provision of a crime requires that a present sentence be enhanced because the person has been previously convicted of a specified crime. For the purpose of this section, a sentence is enhanced only if the maximum sentence that may be imposed is increased or a mandatory minimum non-suspendable sentence must be imposed. The Supreme Judicial Court shall provide by rule the manner of alleging the prior conviction in a charging instrument and conditions for using that prior conviction at trial.[1999, c. 196, _2 (new).]

APPENDIX K

> "If a prior conviction must be specially alleged pursuant to M.R.S.A 17-A §. 9-A (1) it may not be alleged in an ancillary complaint.." M.R.Crim. P Rule 3 (a).

The State did not allege the prior conviction in the original complaint. The State knew or should have known that

> "Unless the statutory class for the principal offense would be elevated thereby, amendment of a complaint for purposes of 17-A M.R.S.A. § 9-A (1) may be made as of right by the attorney for the state at any time prior to the imposition of sentence on the principal offense." M.R.Crim. P. Rule 3 (d).

The new Complaint under this docket number, CR-2001-00086, is an obvious attempt by the Attorney for the State to mask what is really an illegal amendment to the original charging instrument, CR-2000-01207. In accordance with the law above, the Class C , Title 29-A M.R.S.A. Sec. 2411 charges described in docket no. WISDC-CR-2001-00086 must be dismissed. The Defendant prays that this Honorable Court will so ORDER on this issue alone.

2. EVEN IF THE COMMENCEMENT OF CR-2001-00086 WAS ALLOWED UNDER THE MAINE RULES OF

CRIMINAL PROCEDURE RULE 3 (A), THE PRIOR CRIMINAL HOMICIDE CONVICTION, AS THE ESSENTIAL ELEMENT OF THE CLASS C FELONY CHARGE, OCCURRED PRIOR TO THE EFFECTIVE DATE OF THE STATUTE THAT ESTABLISHED THE CRIMINAL HOMICIDE AS AN ELEMENT AND THE CLASS C FELONY CHARGE CAN THEREFORE NOT BE SUSTAINED.

LD 2406 "An Act to Amend the Felony-operating-under-the-influence Laws" was enacted on April 14th, 2000 and became effective on August 11th of the same year. The Act is now law as Title 29-A M.R.S.A. Sec. 2411(6).

> "6. Aggravated punishment category. An operator commits a Class C offense if the State pleads and proves that the operator, while operating a motor vehicle in violation of this section:
>
> > A. In fact caused serious bodily injury as defined in Title 17-A, section 2, subsection 23 to another person or in fact caused the death of another person; or [1999, c. 703, §1 (new).]
> >
> > B. Has either a prior conviction for a Class C crime under this section or a prior criminal homicide conviction involving or resulting from the operation of a motor vehicle while under the influence of intoxicating liquor or drugs or with a blood-alcohol content of 0.08% or greater. [1999, c. 703, §1 (new).]

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> The sentence must include a period of incarceration of not less than 6 months, a fine of not less than $2,000 and a court-ordered suspension of a driver's license for a period of 6 years. These penalties may not be suspended." [1999, c. 703, §1 (rpr).]

This present action "CR-2001-00086" charges a Class C Felony based on the essential element from Title 29-A M.R.S.A. Sec. 2411(6)

> "a prior criminal homicide conviction involving or resulting from the operation of a motor vehicle while under the influence of intoxicating liquor or drugs or with a blood-alcohol content of 0.08% or greater."

This subsection (6) describing the essential element of the statutory class C felony pertaining to Title 29-A M.R.S.A. Sec. 2411 became effective on August 11, 2000.

The Maine Criminal Code, Title 17A, Part 1, Chapter 1, §1 provides
at (1) that

> "When it is alleged that an element occurred 'on or about' any date prior to the effective date of the code, the prosecution shall be governed by the prior laws."

The Maine Criminal Code, Title 17A, Part 1, Chapter 1, §1 provides
at (2) that

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> "For purposes of this section, a crime was committed subsequent to the effective date if all of the elements of the crime occurred on or after that date; a crime was not committed subsequent to the effective date if any element thereof occurred prior to that date, or if the evidence may reasonably be interpreted to establish that any element may have occurred prior to that date. [1981, c. 324, § 1 (amd).]"

The Maine Criminal Code, Title 17A, Part 1, Chapter 1, _ 6 provides that

17A § 6. Application to crimes outside the code

1. The provisions of Parts 1 and 3 and chapter 7 are applicable to crimes defined outside this code, unless the context of the statute defining the crime clearly requires otherwise. [1989, c. 502, Pt. D, §9 (amd).]

2. [1977, c. 510, § 17 (rp).]

3. [1977, c. 510, 17 (rp).]

There is nothing in the context or language of Title 29-A M.R.S.A. Sec. 2411, Criminal OUI, that "clearly requires" that these Maine Criminal Code provisions be disregarded.

The essential element of the Class C felony charge that is being brought under Docket No. CR-2001-00086 by the Attorney for the State, is a prior homicide conviction that occurred in 1988. M.R.S.A. 29-A _ § 2411(6) became

effective on August 11, 2000. As the essential element of the Class C Charge occurred twelve years prior to the effective date of M.R.S.A. § 29-A _ 2411(6) this Complaint under CR-2000-00086 must be dismissed.

WHEREFORE, based on one or both of the issues raised in this motion, Defendant prays that this Honorable Court will find grounds to dismiss this action with prejudice.

Signed and dated this 21st day of March, 2001 by the Defendant

" "

Donald D. Chisholm
P.O. Box 100
Great Wass Island
Beals, Me. 04611

APPENDIX K

STATE OF MAINE

Cumberland County

AFFIDAVIT

I, Thomas F. Hallett, Attorney at Law, residing in Cumberland County and a member of the Maine Bar Association, #3142, do hereby swear that the following statements are true to my best knowledge and belief.

1. I was counsel of record for Donald D. Chisholm in a criminal action CR-87-1955 in Cumberland County Superior Court 1987- 1989 and a civil action CV-89-1271 in the same court in 1994- 1995.

2. Mr. Chisholm is proceeding in a post conviction review action, CR-03-17, and the Superior Court of Lincoln County has listed as an issue for review a matter which involves CR-87-1955 and CV-89-1271.

3. I understand that Mr. Chisholm involves these actions as a listed issue and depends on jurisdiction for their inclusion in accordance with M.R.S.A. Title 15, §2124, section 3 (C), which states as follows:

"§2124. Jurisdictional prerequisite of restraint or impediment

> An action for post-conviction review of a criminal judgment of this State or of a post-sentencing proceeding following the criminal judgment may be brought if the person seeking relief

demonstrates that the challenged criminal judgment or post-sentencing proceeding is causing a present restraint or other specified impediment as described in subsections 1 to 3: [1997, c. 399, §2 (amd).]

3. Present indirect impediment. Present restraint or impediment resulting indirectly from the challenged criminal judgment of this State.

C. A pending trial or any of the restraints or impediments specified in subsection 1 following a criminal judgment in this State, another state or in a Federal Court for *a crime for which proof of the criminal judgment of this State that is challenged constitutes* ***an element of the subsequent crime***. [emphasis added] [1979, c. 701, §15 (new).] "

4. I understand CR-87-1955, a vehicular manslaughter conviction, constitutes an element of the subsequent crime, operating under the influence, which was charged in Lincoln County in the year 2001, docket number CR—2001-48.

5. Mr. Chisholm has related to me that he attempted through court appointed counsel, Daniel Purdy, Esq. to pursue a post-conviction action involving CR-87-1955 upon its attachment as an element in CR-2001-48. Mr. Chisholm further related to me that he believes that his counsel refused to proceed despite knowing that legal grounds existed to use the post conviction procedure as an affirmative defense to the new charges.

APPENDIX L

6. On numerous occasions since the jury verdict in the civil action CV-89-1271 I have expressed to Mr. Chisholm my belief that the jury verdict in CV-89-1271 is in direct conflict with the finding of fact in the criminal judgment CR-87-1955. Based on my personal knowledge of the evidence presented by the State of Maine in CR-87-1955 and by the Plaintiff Stephen E Beale in CV-89-1271 and based on the evidence presented by Mr. Chisholm's accident reconstruction expert and other evidence in both cases I have concluded the jury in CV-89-1271 found Robert Beale, the decedant, "negligent and a proximate cause of the accident" for one reason and one reason only. I believe that the jury found that Robert Beale had crossed the centerline into the wrong lane of travel, where Mr. Chisholm was proceeding in the proper lane of travel. I believe that the jury found Mr. Chisholm more negligent than Robert Beale due to evidence that his blood alcohol level was reported as .21 by the state crime laboratory. I am aware of the statutory standard for guilty verdicts in vehicular manslaughter cases in Maine and I believe I am stating that standard correctly in accordance with M.R.S.A. 17-A, Part 1, Chapter 2, § 33 as follows:

> **§33. Result as an element; causation**
>
> Unless otherwise provided, when causing a result is an element of a crime, causation may be found where the result would not have occurred but for the conduct of the defendant operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the defendant was clearly insufficient. [1981, c. 324, § 14 (new).]

APPENDIX L

7. I believe that there is a case to be made, through a post conviction proceeding, that the manslaughter conviction CR-87-1955 that was attached as an element of the current offense CR-2001-48 did not meet the standard as quoted above. I believe the concurrent cause, the action of Robert Beale, was clearly sufficient to produce the result and that the conduct of the defendant, Donald D. Chisholm, was clearly insufficient.

8. I would be willing to testify to these matters in the current post conviction action, CR-03-17 upon order of the Lincoln County Superior Court.

I hereby swear as an officer of the court and as a member of the Maine Bar Association that the statements herein contained are believed by me to be true and accurate to my best knowledge as so evidenced by my signature hereto affixed.

Signed under the pains and penalties of perjury this 15th day of January, 2004 at Portland, Maine.

" _____ "

Thomas F. Hallett

STATE OF MAINE January 15, 2004

CUMBERLAND, ss.

Personally appeared the above- named, Thomas F. Hallett, and swore that the above information is true, based upon his personal knowledge, and where stated upon

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